ORIGINAL

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

v. **CASE NO.: CF97-00047A-XX**

THOMAS D. WOODEL,
Defendant.
_____/

ORDER ON AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS MATTER is before the Court upon Defendant's Motion To Vacate Judgments Of Conviction And Sentence, filed on November 6, 2009; the State's Answer To Motion To Vacate and Memorandum of Law, filed on January 4, 2010; the Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, filed on April 16, 2010, the State's Answer To Amended Motion To Vacate, filed on May 6, 2010; the Defendant's Notice of Withdrawal Of Ground 1(B) of Amended 3.851 Motion, filed on June 30, 2010; the Defendant's Notice of Withdrawal Of Ground 2(D) of Amended 3.851 Motion, filed on August 18, 2010; the Defendant's Written Closing, filed on July 25, 2011; the State's Closing Argument, filed on August 22, 2011; and the Defendant's Reply To State's Closing Argument, filed on September 9, 2011. An evidentiary hearing was conducted on March 21 –25, May 11-13, and June 3, 2011. The Court having reviewed Defendant's Amended Motion, and the State's Answer to the Amended Motion, having heard the testimony and reviewed the evidence presented at the evidentiary hearing; having heard the arguments of legal counsel; having reviewed the Closing Arguments, Responses, and Replies from all parties; having reviewed the case file, and the

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applicable case and statutory law; and being otherwise fully advised in the premises, finds as follows:

STATEMENT OF PROCEDURAL HISTORY

On January 16, 1997, the Defendant, Thomas D. Woodel, (hereinafter referred to as Mr. Woodel), was charged by indictment with two counts of first-degree premeditated murder, one count of armed burglary, and one count of armed robbery for the murders of Bernice and Clifford Moody, which occurred on December 31, 1996. The jury returned a verdict of guilty on all charges on December 4, 1998.

The penalty phase of the trial was conducted, and on December 7, 1998, the jury recommended a sentence of death by a vote of 9 to 3 for the murder of Clifford Moody, and a sentence of death by a vote of 12 to 0 for the murder of Bernice Moody. The Honorable Robert E. Pyle, followed the jury's recommendations and sentenced Mr. Woodel to death for both of the murders. On direct appeal the Florida Supreme Court affirmed all of the convictions. However, the Florida Supreme Court vacated both of the death sentences. In its Order, the Florida Supreme Court stated; "The sentencing order at issue here fails to expressly evaluate each mitigating circumstance, fails to determine whether these mitigators are truly mitigating, fails to assign weights to the aggravators and mitigators, fails to undertake a relative weighing process of the aggravators vis-a-vis the mitigators, and fails to provide a detailed explanation of the result of the weighting process." The Florida Supreme Court went on to state, "We are unable to provide a meaningful review of the impostion of the death sentence or undertake our proportionality review. See Jackson, 767So.2d at 1159." See Woodel v. State, 804 So.2d at 327 (Fla. 2001).

On remand to the trial court, the original trial judge was not available and a new penalty phase was conducted by the Honorable Susan Roberts. On remand the jury recommended a sentence of life for the murder of Clifford Moody and a sentence of death for the murder of Bernice Moody by a vote of 7 to 5. Judge Roberts followed the jury's recommendation and sentenced Mr. Woodel to death for the murder of Bernice Moody. Judge Roberts found that

there were four aggravating circumstances. The aggravating circumstances found by the trial court were prior violent felony conviction; committed during commission of a burglary; especially heinous, atrocious or cruel (HAC); and victim vulnerability due to age of disability. The trial court found four statutory mitigators. The four statutory mitigators found by Judge Roberts were no significant criminal history, defendant's age; substantial impairment of capacity to appreciate his actions or conform his conduct to the requirements of law; and extreme emotional disturbance. Judge Roberts also found ten non-statutory mitigators. The ten non-statutory mitigators found by Judge Roberts were physical abuse as a child; neglect and rejection by his mother and others, an unstable home as a child; parents who were deaf and spoke primarily in sign language; abuse of alcohol and drugs; willingness to meet with the victim's daughter; willingness to be tested for bone marrow donation for his daughter; the Defendant's belief in God; the Defendant's voluntary confession, and the Defendant's compassion for others. Judge Roberts found the aggravating factors far outweighed the mitigating factors and sentenced Mr. Woodel to death for the murder of Bernice Moody. The Florida Supreme Court affirmed Mr. Woodel's sentences including his sentence of death for the murder of Bernice Moody. Woodel v. State, 985 So.2d 524 (Fla. 2008). The Florida Supreme Court denied rehearing on June 26, 2008. On November 17, 2008, the United States Supreme Court denied certiorari. Woodel v. Florida, 129 S.Ct. 607, 172 Led 2d 465 (2008). Mr. Woodel filed his Motion To Vacate Judgments of Conviction And Sentence on November 6, 2009. Mr. Woodel filed his Amended Motion To Vacate Judgments Of Conviction And Sentence on April 16, 2010.

STATEMENT OF THE CASE FACTS

The facts of the case are set forth in Woodel v. State, 804 So.2d 316, 319-320 (Fla.2001), and are presented below:

> A Polk County grand jury returned a four-count indictment against Thomas Woodel, charging him with first-degree murder of Clifford Moody, first-degree murder of Bernice Moody, armed robbery, and armed burglary. A jury convicted Woodel on all four counts.
>
> Clifford Moody, who was seventy-nine years old, and his seventy-four year old wife, Bernice, lived in a mobile home trailer on lot 533 at

Outdoor Resorts of America in Polk County. The Moodys owned another trailer on adjoining lot 532, which they sometimes rented. Bernice was seen by the newspaper delivery man cleaning lot 532 about 4:30 to 4:45 a.m. on December 31, 1996. Clifford was last seen by a security person at the Outdoor Resorts Laundromat at about 5:30 a.m. The Moodys were preparing to show the mobile home for rental that day.

The Moodys were found dead a little after 1 p.m. on December 31, 1996. Clifford was found lying on his back in the dining room area of the trailer on lot 532. His underwear and pants had been pulled down to below his knees. His eyeglasses lay approximately two feet from his bead. Dr. Alexander Melamud, the medical examiner, testified that Clifford received a total of eight stab wounds, causing more intemal than external bleeding, and that he died as a result of these stab wounds close in time to his wife's death.

Bernice was found in the same trailer with multiple stab wounds. She lay dead on a bed in the back of the trailer and was nude except for one sock. A nightgown and female underwear with a knot tied in it lay on the floor next to the bed. Additionally, pieces of a porcelain toilet tank lid were found underneath her. Dr. Melamud testified that Bernice incurred a total of fifty-six cut or stab wounds, many of which on her right arm he opined to be defensive. Her jugular vein had been slit. Additionally, she had received significant blunt trauma injuries to her head, and her nasal bones were fractured. Dr. Melamud testified that Bernice died as a result of her injuries sometime in the early morning hours of December 31, 1996. No semen was detected on Bernice.

With the permission and assistance of Outdoor Resorts, detectives searched the park's dumpsters the morning of January 3, 1997. The dumpsters had not been emptied since prior to December 31, 1996. During the search, detectives found three garbage bags containing pieces of a porcelain toilet tank lid, a wallet containing Clifford's identification and credit cards, keys with a tag stating "Cliff's keys," glasses, bloody socks, paperwork with the address of lot 301, and paperwork bearing the names of the defendant and his son, Christopher Woodel.

That afternoon, detectives went to lot 301. Woodel lived there with his long-time girlfriend, Christina Stogner, and his sister, Bobbi Woodel. Woodel and his sister signed consent forms to have their trailer searched. Stogner was out of town at that time. Also present that day at lot 301 was Gayle Woodel. Although not known at that time, it would later be discovered that Gayle married Woodel in 1989, and they had a son together, Christopher. Gayle and Woodel separated in 1992 but never divorced. In 1996, Gayle and Christopher lived in North Carolina while Woodel lived in Florida. However, Gayle had just come to Florida from

North Carolina so that Christopher could spend some time with Woodel. Gayle, Christopber, and two of Gayle's friends were staying at Woodel's trailer.

While some detectives searched the premises, Woodel agreed to be questioned by other detectives. As Woodel left with the detectives, Woodel went over to Gayle and whispered for her to get rid of the knife Woodel had hidden. Gayle told Woodel's landlady and friend about the content of thc communication. Gayle later told deputies as well.

The detectives gave Woodel *Miranda* warnings, and he consented to talk with them. He initially told the detectives that he had been home asleep at the time of the murders. After further questioning, Woodel began to write out a statement. He then stopped and confessed to killing the Moodys, wbom he said he had never met. The detectives then tape-recorded Woodel's confession. In this taped confession played for the jury, Woodel admitted to drinking with others that evening after work in the lot next to the Pizza Hut where he worked. Afterwards, Woodel walked to Outdoor Resorts, a little over a mile from the Pizza Hut. Woodel admitted to entering the Moody's rental trailer early in the morning after seeing Bernice through the window. He said he went in to ask for the time. According to Woodel, Bernice was alone in the trailer. Upon seeing him, she came at him witb a knife, over which Woodel soon gained control. He then proceeded to stab her many times and hit her over the head with a porcelain toilet tank lid one to three times. The toilet lid shattered.

Clifford was last seen doing laundry at the Laundromat by security guard Elmer Schultz between 5:30 and 5:40 a.m. In his confession, Woodel said that he was leaving the trailer when Clifford came inside. Woodel then stabbed Clifford. As Clifford lay on the floor, Woodel picked up a bucket and placed pieces of the shattered toilet tank lid in it. He also placed the knife along with several other items in the bucket. Woodel said that after stabbing Clifford, he took Clifford's wallet.

Woodel also said in his confession that he threw some items into a canal in the mobilc home park, threw some items away in his garbage, and hid the knife behind a dresser. Deputies would later find pieces of the toilet tank lid and Bernice's eyeglasses in the canal, and a knife in Woodel's room wedged between a wall and the dresser.

POSTCONVICTION MOTIONS

The Defendant filed his Motion To Vacate Judgments Of Conviction And Sentence on November 6, 2009; and the State filed the State's Answer To Motion To Vacate and Memorandum of Law on January 4, 2010. The Defendant filed an Amended Motion To Vacate Judgments of Conviction And Sentence, on April 16, 2010; and the State filed the State's Answer To Amended Motion To Vacate on May 6, 2010. The Defendant filed a Notice of Withdrawal Of Ground 1(B) of Amended 3.851 Motion on June 30, 2010; and the Defendant filed a Notice of Withdrawal Of Ground 2(D) of Amended 3.851 Motion on August 18, 2010.

CASE MANAGEMENT CONFERENCE

Case Management Conferences were held on March 10, 2010 and May 13, 2010, pursuant to Rule 3.851, Fla. R. Crim. P. The Court found that it would be appropriate to have an evidentiary hearing on Claims IA, IC, 1D, IIA, IIB, IIC, IIE, IIF, and IVB , of the Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, filed on April 16, 2010.

EVIDENTIARY HEARING - TESTIMONY

An evidentiary hearing was held in this matter on .March 21 –25, 2011; May 11-13, 2011; and June 3, 2011. The testimony presented by the witnesses included the testimony summarized below.

Testimony of Allen R. Smith from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume I, pages 33- 132..

The Defense called Allen R. Smith as a witnesses. Mr. Smith is an attorney who was appointed to represent Mr. Woodel on February 5, 1997. Mr. Smith testified that he was

primarily responsible for the guilt phase in Mr. Woodel's case at his 1998 trial. Mr. Smith agreed that their theory at the guilt phase was that Mr. Woodel was too drunk to form the intent necessary for premeditation. Mr. Smith agreed that he did request and the defense did receive an instruction of voluntary intoxication. In closing arguments, Mr. Smith argued that the defendant was guilty, at worst, of second degree murder because he had no intent to commit murder. Mr. Woodel had no plan, there was no evidence that he had premeditatedly designed to commit any crime. Mr. Smith agreed that this was due to Mr. Woodel's alcohol consumption.

Mr. Smith testified that he hired investigator, Wayne Tucci. Mr. Tucci's primary responsibility was to corroborate Mr. Woodel's drinking on the night of the incident. RM. Tucci tried to locate some people that were with the defendant on the night of the incident but was unsuccessful. Mr. Tucci did not investigate Mr. Woodel's background or do any mitigation investigation for Mr. Woodel. Mr. Smith testified that he did not consult with or consider consulting a toxicologist to explain the effects that intoxication would have had on Mr. Woodel. Mr. Smith was asked about the testimony of Arthur White, a jailhouse snitch, who was called by the State as witness in the case in chief. It was Mr. Smith's opinion that the testimony of Arthur White with regard to fondling was not particularly damaging to Mr. Woodel. He said there was no other evidence, forensic or otherwise, supporting that testimony. Mr. Smith was asked about a statement that Mr. Woodel made to his wife about hiding the knife that the State brought up in opening statements. Mr. Smith agreed that the defense was not aware at the start of trial that Mr. Woodel was still married to Gayle and that spousal privilege would apply. He said that had they known that, they probably would have raised the issue. The defense introduced some exhibits, numbers 44, 45, and 46, which were police reports. Mr. Smith agreed that, based on the police reports, there was evidence that he would have received that Mr. Woodel was still married.

Mr. Smith was asked about Dr. Dee's roll in the penalty phase. Mr. Smith said that part of Dr. Dee's roll was to try and explain Mr. Woodel's history and his youth and what kind of roll his history might have had in the situation. He wanted Dr. Dee to talk about the impact of alcohol on Mr. Woodel and the history of his life altogether. Mr. Smith testified that he was not part of the retrial of the penalty phase in 2004. Mr. Smith agreed that Toni Maloney became involved in November, 1998 after jury selection of the guilt phase had begun. Mr. Smith agreed that he thought it was Toni Maloney who had discovered that both of Mr. Woodel's parents were deaf. Mr. Smith testified that he never considered hiring an expert in deaf culture or an expert in the phenomenon known as CODA, which is the hearing children of deaf adults. He did not know they existed. Mr. Smith was asked about interviewing Mr. Woodel's father, Albert. He testified that he thought this happened just before the penalty phase started. Mr. Smith acknowledged that they used Mr. Woodel's sister, Bobby, as an interpreter to talk with Albert. Mr. Smith said that Mr. Colon's office was primarily responsible for finding the mitigation witnesses and the mitigation records. Mr. Smith was asked again about Arthur White. Mr. Smith agreed that he had handled the cross-examination of Mr. White in the guilt phase of the trial. Mr. Smith said that he took Mr. White's deposition and that he had also reviewed his entire criminal record. Mr. Smith testified that he didn't see anything in the files or anything in Mr. White's testimony as far as the deposition or at trial that indicated that he got some kind of special deal or that cases were modified prior to his testimony. Mr. Smith was asked why he didn't consult a toxicologist or consider consulting a toxicologist. Mr. Smith responded, "I had never done that and I didn't -- I mean, it didn't -- it didn't cross my mind." (EH March V1/57).

On the date that the defendant's wife, Gayle, was going to testify, the State divulged to Judge Pyle that they had just learned that she was still the wife of the defendant and they proffered her testimony. At that point, Judge Pyle ruled that her testimony was not admissible because of the marital privilege. Mr. Smith agreed that he asked for a mistrial at that point in

time. Mr. Smith agreed that at the time they asked for a mistrial, the State had not introduced the defendant's taped statement. In his taped statement, the defendant was asked what he had done with the murder weapon and he said that he had put the murder weapon behind a privacy dresser type thing in his bedroom. The defendant's taped statement was made on January 3rd. Mr. Smith testified that had the jury actually heard testimony from the defendant's wife, Gayle, that he had told her that the knife was behind the dresser that possibly could have been an issue that resulted in a mistrial, but the jury did not hear this evidence directly from Gayle and they ultimately did hear this evidence when the confession of the defendant was played for them. At the evidentiary hearing, the State asked Mr. Smith about the Florida Supreme Court opinion in Woodel v. State, 804 So.2d 316 (Fla. 2001). The State pointed out that the Florida Supreme Court noted that there was not contemporaneous objection and that the error was not so prejudicial as to vitiate the entire trial. The State quoted the following language from the Florida Supreme Court opinion: "Essentially, the comment was for Gayle to get rid of the knife. However, Woodel was not harmed by the comment because Woodel confessed to the crime, discussed the location of the knife in his confession, and signed a consent form for the trailer to be searched. For each of these reasons, the trial court did not err in denying the mistrial motion." Mr. Smith agreed that in the context of what the jury was going to hear regarding the defendant's confession, he did not really have a valid basis for getting a mistrial.

Mr. Smith was asked about his comfort level in terms of Dr. Dee's ability to identify the mental health issues that they wanted to present to the jury for mitigation purposes. Mr. Smith said that he thought that Dr. Dee was very competent. Mr. Smith was asked the following question by the State: "As you sit there now from your standpoint, do you feel that it would have been necessary to use a psychologist who had some prior knowledge or understanding of that area as opposed to using Dr. Dee who educated himself by reading the literature and making that presentation to the jury?" Mr. Smith responded; "Well, obviously had I had knowledge of

that background, that information, I could at least had inquired about that and found out what other things they would have known or been involved in that maybe Dr. Dee wouldn't have been involved in. And, obviously, had I had the knowledge now that - - back then, I might have sought out somebody who was a specialist, but I didn't even know they existed." (EH March V1/119). On redirect Mr. Smith was asked again about a legal basis to keep the issue of fondling out in a pretrial motion. Mr. Smith agreed that the defendant was never charged with sexual battery, so the defense could have argued that the testimony was irrelevant and even if it was relevant, the prejudicial value outweighed any probative value. Mr. Smith was asked if Tommy had always denied that the fondling had taken place. He answered, "Absolutely." (EH March V1/130).

Testimony of Wayne Tucci from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume I, pages 133- 155.

The defense called Angelo Wayne Tucci as a witness at the evidentiary hearing. Before he retired, Mr. Tucci was a private investigator. Mr. Tucci testified that in December, 1997, he was appointed to work on the case of Thomas Woodel. Mr. Tucci testified that he did not have any particular training in mitigation investigation or in conducting a biopsychosocial assessment of a defendant. Mr. Tucci testified that in Mr. Woodel's case, he thought that he had talked to approximately half a dozen witnesses. Mr. Tucci testified that basically the people he interviewed during his investigation was for the purpose of trying to corroborate Mr. Woodel's drinking on the night of the crime. He tried to dig up additional witnesses who saw Mr. Woodel drinking on the night of the incident. Jessica Wallace told him some other men or boys were drinking with Mr. Woodel, but her description of them was not sufficient enough for him to follow up on the matter. He also talked to interview a guy at a 7- Eleven store to see if Mr.

Woodel or any other person on the witness list had purchased any alcohol there. Mr. Tucci was asked if there had been a $1,500.00 cap for his services of the 1998 trial, and he answered that he thought that was correct. Mr. Tucci was asked if he thought that he had used this entire amount and he responded that he didn't think he came close to it. Mr. Tucci was hired again for the 2004 penalty phase. He agreed that the sole purpose for which he was hired in 2004 was to serve subpoenas. Mr. Tucci testified that he thought he was paid about $128.00 for this work. Mr. Tucci testified that he was not hired in 2004 to do any further investigation.

Testimony of Toni Maloney from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume I, pages 156 – 184, and Volume II, pages 189 – 213.

The defense called Toni Maloney as a witness. Mrs. Maloney testified that she was currently employed as a licensed private investigator in the State of Florida and had been employed as such since 1998. Mrs. Maloney testified that prior to 1998, she worked at the Public Defender's Office for just under 14 years. When she worked at the Public Defender's Office, she was an investigator and she had two areas of specialization. One of the areas of specialization involved cases where significant mental health issues existed and the other area of her specialization was capital cases. Mrs. Maloney was asked how many capital cases she had been involved in as a capital mitigation investigator. She answered that she had worked on roughly well over 100 such cases

Ms. Maloney was court appointed in November 1998 to work on Mr. Woodel's first trial. She was retained on November 12, 1998 and jury selection had begun on November 9, 1998. She testified that she thought she had been appointed because Dr. Dee wanted someone to assist with

some social history investigation or help pulling some records or interview together. She said that normally she would be appointment months earlier.

. Mrs. Maloney was asked about the importance of getting a multigenerational history of the defendant. She replied, "Well, what we're looking for is to see if there are things, whether they might be genetic in the history of the client or whether there is a predisposition to some issue that might impact the client's development and behavior. For example: A predisposition to addiction, whether it's drugs or alcoholism or whatever or are there any medical or physical issues that run through the family that would impact our client's behavior. (EH March V1/161).

Defense counsel asked Ms. Maloney if it was standard practice when conducting capital mitigation to travel to an area where a client had lived for many years. Ms. Maloney answered affirmatively, and added that this allowed you to see the environment where the client grew up. Ms. Maloney also testified that she was sure she had attempted to obtain some records. Defense counsel showed Ms. Maloney counseling records for Thomas Woodel that contained a note that she recognized as being in her handwriting. The records were dated November 4, 1982. The therapist was Thomas Kerwin. She did not recall ever having contact with Thomas Kerwin. She said that in preparation of a capital mitigation presentation Thomas Kewin would have been someone she would have contacted right away. Defense counsel also showed Ms. Maloney some records from the Children's Home, Incorporated that referred to Thomas Davis Woodel and Bobbie Lisa Woodle. She testified that she remembered the records from the Children's Home and they indicated that Mr. Woodel was admitted August 30, 1976. She testified that there were several people named in the documents that they would have testified if they had had the time. Ms. Maloney was also shown some school records and she agreed that some of them were

obtained by trial counsel and her, and some were obtained by CCRC. She agreed that school records would be something that was standard to obtain. These would be given to the defense's experts, and school records might turn up some potential witnesses.

Ms. Maloney testified that she interviewed Mr. Woodel in the attorney interview area at the jail. As she was asking him questions about the dynamics of his family, she recognized that what he was doing with his hands was signing. At that point in time she had no idea that either of his parents was deaf. She asked if he knew signing and he answered affirmatively. As they talked she learned that both his father and mother were deaf. She testified that when she left the interview she immediately contacted Dr. Dee and telling him that they had an issue she had never dealt with before. She said; "This young man was raised in a household where what I just learned is that he and his sister, who was also in the household at the same time, hear and speak, neither one of his parents hear and speak and I think that that's pretty significant." (EH March V1/171).

She said that Dr. Dee did not know that at the time. She testified that she started doing research and found a book called Mother Father Deaf which she thinks she gave to Dr. Dee. She said that they hoped to find a professional or someone that could connect with Dr. Dee to help him become more educated on the topic, but they were not able to find someone. They had less than three weeks to do this, and that period of time included the Thanksgiving holiday. At the evidentiary hearing the State said to Ms. Maloney that it sounded like she had utilized all of the avenues that were available to her to find a CODA expert. She responded; "No I don't give up

that easily to be honest with you. If I had the time we would have found somebody. I have confidence in that. I- - I just didn't have time. " (EH March V2/206).

Ms. Maloney was asked if she tried to contact any other witnesses besides, Mr. Woodel's sister Bobbie, his paternal aunt, Becky Russell, and his father, Albert Woodel. Ms. Maloney testified that she tried to contact Mr. Woodel's mother, but she was not successful. Ms. Maloney was asked if there was any additional mitigation investigation that needed to be done, and she responded affirmatively. She was asked why additional mitigation investigation was not done, and she replied; "We just didn't have time." (EH March V1/178). Ms Maloney was asked what else should have been investigated. She testified that there should have been a visit to the area where Mr. Woodel grew up. She testified that she needed to visit North Carolina and Michigan to find people who knew the family and knew about the deaf culture.

Ms. Maloney was asked if she was ever contacted by Mr. Colon to do any mitigation investigation when the penalty phase was retried in 2004. She testified that she never had any more contact with anyone about the case after the 1998 trial. See testified that she would have recommended that additional mitigation investigation was needed had she been contacted. The Court asked Ms. Maloney if she had ever been contacted by Mr. Colon for the new penalty phase in 2004, and she replied, " – no sir, I never did. I had no contact. " (EH March V1/181).

Testimony of Danielle Waller from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume II, pages 214 – 332 , and Volume III, pages 335- 439.

The defense called Danielle Waller as witness. Ms. Waller is self-employed as a mitigation specialist, and she has been a mitigation specialist for 11 years. Ms. Waller worked for five years for the Florida State Appellate Defender's Office in the death penalty assistance division. Ms. Waller testified that, "A mitigation specialist interviews witnesses, obtains records, conducts a multigenerational investigation into the client and their family." (EH March V2/218). She testified that she also identified areas where expert assistance would be helpful and provided experts with background documents. Ms. Waller interviewed 18 witnesses in preparation for this case. Ms. Waller testified that she had reviewed police reports, reports from the prosecution, the trial attorney's file, and documents that CCRC gave her. Defense counsel showed Ms. Waller a substantial amount of documentation that was located by CCRC and trial counsel about the Defendant and his family members concerning matters before the time of the 2004 penalty phase trial. These included school records, divorce records, police reports, and criminal records of Mr. Woodel , his parent's Jackie and Albert, and other relatives of Mr. Woodel.

Ms. Waller testifed that the defendant's maternal grandparents, Robert and Edna Alward were alcoholics and there was domestic violence in the household. The defendant's mother, Jackie, and her brother, Robert Alward, were deaf and neither of the parents learned sign language. Ms. Waller reviewed Jackie's records from the Michigan School for the Deaf, which revealed an IQ of 80 and that she dropped out of school.

Ms. Waller testified that the defendant's paternal grandparents, Mary Young and Davis Woodel abandoned their children, Albert and Becky, when they were young. When Davis

Woodel was serving in the military, Mary got pregnant by another man. Ms. Waller said that Davis Woodel was an alcoholic who was not involved in the raising of Albert and Becky. Albert and Becky were raised by Davis' mother, Ella. Ms. Waller testified that Albert Woodel was an abusive alcoholic. He was known in the deaf community as a thief and preyed on people were deaf.

After Albert and Jackie Alward divorced, Albert married Linda Mattson. The marriage lasted three years and ended due to Albert's affair with Beverly. Beverly was 17 years old and Albert was 44. Ms. Waller said that Tommy Woodel had feelings for Beverly, which is important because it was the ultimate betrayal by his father.

Ms. Waller testified that the defendant's sibling were also dysfunctional. Charles Sisk, his half-brother, died at age 16 as a result of an alcohol related automobile accident. Scott Sisk, the defendant's other half-brother, had chronic drug and alcohol problems and was sentenced to prison the first time at age 18. The defendant's sister, Bobbie, had an alcohol problem and attempted suicide at the age of 13. Ms. Waller testified that nobody left this family unscathed.

Ms. Waller was familiar with the 1989 and 2003 ADA guidelines. She identified areas where a mitigation specialist would have been helpful. She was also of the opinion that, based on the 2003 ADA guideline, a CODA expert should have been retained.

Testimony of Gene C. Bowen from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume III, pages 439 – 495.

The defense called James C. Bowen as a witness. Mr. Bowen testified that he was at the children's home in Winston Salem, North Carolina for three years, along with the defendant. He testified that his brother and sister were also at the children's home and they had been removed from their home because of abuse and neglect. He testified that both is parents were alcoholics. Mr. Bowen testified that the children's home was highly structured but that the defendant, Tommy, struggled in making an adjustment pretty much over the whole three year period that he knew him. He described Tommy as being in the bottom of the social pecking order in their cottage. He said Tommy would give up things so that he could hang out with the older boys who were considered cool. He testified that the whole three years that he was at the children's home, Tommy and his sister, when they met together would always sign. He testified that when Tommy would do this with his sister, he would become very animated. When Tommy was not communicating by signing, his face was blank. He had an expression on his fact that seemed to look like he was dazed. Mr. Bowen testified that he was not contacted by Tommy's defense team in either 1998 or 2004, but if had been contacted he would have been available and willing to testify to the same things he testified to at the evidentiary hearing.

Testimony of Gilberto Colon from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 499 – 560.

The defense called Gilberto Colon, Jr. as a witness. Mr. Colon agreed that he was appointed to represent Tommy Woodel on March 7, 1997. At the time he was appointed to represent Mr. Woodel, he had taken two or three capital cases to a verdict. Mr. Colon testified that he was

aware of the ABA guidelines. Mr. Colon's theory of the case was that the murders were unintentional and that the defendant had been drinking and be did not remember details of the murder.

Mr. Colon did not remember if he had ever talked to the investigator Wayne Tucci, who had been hired to work on the case. Mr. Colon testified that he was responsible for investigating the 1998 penalty phase, but he and Al Smith both worked together on both phases of the trial.. He testified that he was responsible for doing the background mitigation investigation for that trial. Mr. Colon was asked what his penalty phase theory was in 1998. Mr. Colon answered, "Well, to the best of my recollection, that alcohol was a factor; that he had no prior criminal violent record; that he had grown up in a family with deaf parents where the mother was abusive, neglectful, provided a very poor household environment where Tommy had to even go to a children's home for a period of time; where he and his sister - - where bis - - him and his sister would actually have to wait until the neighbor would pull into their driveway, take a bag of groceries inside the house, and then they would go and take that - - that food out of the trunk of that vehicle, that was part of it." (EH March Vol4/512).

The defense counsel asked Mr. Colon if he recalled Mr. Woodel's statement to Gayle to get the knife or hide the knife. Mr. Colon said that he recalled the statement after he was reminded of it and that he did not remember whether he filed a motion in limine to keep it out. Defense counsel mentioned to Mr. Colon that the State, in its opening statement, had referred to Tom's statement to his wife, Gayle, about the knife. The State later advised the Court that they realized that Gayle Woodel was still married to the defendant. Mr. Colon was asked if he knew that they

were still married. Mr. Colon answered, "You know, I don't - - I remember the - - what happened when it came out in opening and I remember later on the disclosure that, in fact, they were - - they were married. What I don't remember was whether we knew, whether the objection did not come because we just missed it, or whether because we believed they were married or not married - - sorry - - so I don't recall a reason." (EH March V4/513-514. Mr. Colon testified that it was definitely not a strategic decision to let that information come out in opening statements.

Mr. Colon testified that he did some investigation for the 1998 penalty phase, but his memory was vague. He did not remember seeing records from the children's home and did not know if they were in his file. Mr. Colon acknowledged he received a memo from Dr. Dee, in which Dr. Dee suggested hiring a mitigation specialist. Dr. Dee recommended Toni Maloney, who was appointed on November 12, 1998, three days after the trial had begun. He did not remember what investigative efforts were made for the 1998 penalty phase other than talking with the defendant and some family members.

Mr. Colon was asked about Dr. McClane, a psychologist, who was appointed on December 10, 1997, to help the defense. His records reflected that he spoke with Dr. McClane on the phone for about fifteen minutes. He did not believe that he ever received a report from Dr. McClane. When he was shown Dr. McClane's report, he agreed that the report noted that both of the defendant's parents were deaf and there was a multigenerational pattern of alcoholism and drug abuse throughout Mr. Woodel's family. Mr. Colon conceded tbat a multigenerational

familty pattern of alcoholism should have been developed for trial, but he did not agree that an expert was necessarily needed.

Mr. Colon was asked about Arthur White, a jailhouse informant that testified that the Defendant had told him that he fondled the victim. The defense alleges Mr. Colon was ineffective for failing to file a motion in limine to exclude the testimony of Mr. White. Mr. Colon testified that he thought Arthur White provided the yuck affect to the case. . Mr. Colon was asked about the 2004 penalty phase. He was asked if he did his own investigation to see how many convictions Arthur White had. Mr. Colon said the only investigation that he completed was asking the State if they had any certified convictions of Mr. White. Mr. Colon testified that he didn't have an independent recollection if Mr. Wallace, the Assistant State Attorney, had shown him certified copies of the convictions; however, Mr. Colon testified that having worked with Mr. Wallace for many years, he would have no reason to doubt the number of convictions that Mr. Wallace would have told him. Mr. Colon testified that there would not have been a down side to cross examining Mr. White about crimes of dishonesty or false statements had he been aware that Mr. White gave an incorrect number of felony convictions. Mr. Colon also testified that he didn't investigate to see what kind of sentence Mr. White might have received before he testified. Mr. Colon testified that he relied on Mr. Wallace's reputation that there were no deals in place with regard to Mr. White.

Mr. Colon was asked again about the 1998 penalty phase. He testified that he was responsible for doing the background mitigation investigation for that trial. Mr. Smith also worked on that as well. Defense counsel showed Mr. Colon defense exhibit eight, which were records of which were children's home records. Mr. Colon said that he remembered that they

did a background check pertaining to the fact that the defendant and his sister had been in a home, but he did not remember the children's home records that he was being shown. Mr. Colon testified that it was likely that the children's home records were obtained by Toni Maloney and not him. Mr. Colon was shown defense exhibit seven, which were counseling records from Tom Kerwin. Mr. Colon said he didn't remember seeing those records and that they were likely obtained by Toni Maloney. Mr. Colon was asked again what kind of investigative efforts he had done to investigate the 1998 penalty phase mitigation presentation. Mr. Colon answered, "Again, I don't remember. It was so long ago. I either spoke with Tommy, spoke with - - perhaps with family members, maybe the ones that were able to communicate with. We may have done a background check but, again, I don't remember all those details." (EH March V4/524).

Mr. Colon was asked what mitigation witnesses he talked to in preparation for the 1998 penalty phase. He said that he thought remembered meeting the sister and the father, either at Dr. Dee's office or perhaps at a motel. He also said that he may have spoken with the sister, Bobbie, over the phone several times. Mr. Colon was asked if remembered that he spoke to these witnesses after the guilt phase was already over and there was already a verdict. Mr. Colon said that he would like to believe that he spoke to them before that point. Mr. Colon was asked if he recalled that he asked for a continuance at the 1998 trial. Mr. Colon answered that he did remember that. Mr. Colon was shown defense exhibit 43, which he testified was a fax from Dr. Dee to his office dated November 6, 1998. Jury Selection started on Monday, Mr. Colon testified that he did not remember when they asked for a continuance of the trial, but he thinks that they moved to continue the trial before the trial started. Mr. Colon testified that he did not

remember who first found out that Mr. Woodel's parents were deaf. Mr. Colon was asked if he ever considered trying to find an expert who specialized in deaf culture or CODA's. He testified that he did not. He was asked if he ever tried to educate himself on deaf culture or CODA's. Mr. Colon responded, "Well, that's - - that's why we went with Dr. Dee. Once - - we had used - - I had used Dr. Dee in the past. As a member of the defense bar, we've - - we've kind of used Dr. Dee on a frequent basis. And so we asked him about it and he himself proceeded to seek some information and read upon it, so I kind of relied on Dr. Dee for direction in that - - in that area. (EH March V4/535).

Mr. Colon testified that he did not ever consider hiring a toxieologist or other similar type of expert to explain the effects of alcohol or to calculate Mr. Woodel's blood alcohol level at the time of the crime. Mr. Colon testified that he did not think hiring such an expert was necessary and explains why he didn't think such an expert was necessary. He testificd, "Well, my opinion, we live in Polk County and I knew that at least a good portion of those jurors knew what it is to be drunk, so I knew that we knew what a drunk person does when they're - - when they're drunk, such as do stupid things, have memory loss, things of that nature. So no, it never crossed my mind to get an expert to determine his blood alcohol or to get testimony that - - that he was drunk and what drunk people - - what affect drunkenness or alcohol has on a person." (EH March V4/536). Mr. Colon was asked if there was a down side to consulting a toxicologist to assist in the understanding of affects of alcohol on the brain short of presenting the expert at trial. He answered, "You know, usually, I mean, that kind of testimony, I don't see the downside other than this, when you start producing experts in every piece of the defense, I call that shotgun defense and now the jury starts questioning the validity of the actual defense. I didn't want the

jury to start questioning my expert on some areas such as that, that I considered to be as basic as being drunk." (EH March V4/537-538).

Mr. Colon was reminded again that Judge Pyle had not given them a continuance in 1998. He was asked what other family members he had talked to. He agreed that he had not spoken to Tom's mother or to his half brother, Scott. He testified that the family members he remembered were the defendant's dad, his sister and his aunt. He agreed that he never traveled to Morgan Town, North Carolina or Flint, Michigan. He also agreed that he never traveled to Pennsylvania, where Mr. Woodel lived with his Aunt Becky. Mr. Colon testified that he did not go visit any members of the deaf community in either Morgan Town, North Carolina, Flint, Michigan, or have Mr. Tucci or Ms. Maloney do that. Mr. Colon was reminded that the matter was sent back by the Florida Supreme Court because the sentencing order done by Judge Pyle for the 1998 trial was deficient.

Mr. Colon was asked what the defenses theory was for the 2004 penalty phase. Mr. Colon responded, " Again, that Tommy was under the influence of alcohol, extreme influence of alcohol, that he never intended to kill anybody, that his past as a - - as a - - growing up in the family that he grew up and the environment that he grew up in may have provided a basis for this, but Dr. Dee could not pinpoint that. But, you know, that was the only explanation that we could come up with, that perhaps this was some kind of repressed aggression that he had for his own mother that had come out during the contact that he had with Ms. Moody." (EH March V4/ 551).

Mr. Colon was asked if he had Wayne Tucci reappointed to assist him in the investigation. He said that he didn't think he did, but he didn't remember. He was asked if he had only hired him to serve subpoenas and Mr. Colon answered, "If that's what the record shows, then that's what I did - -." (EH March V4/553 -554). Mr. Colon agreed that he did not ask Mr. Tucci to do any additional mitigation investigation. Mr. Colon testified that he did not think he tried to have a mitigation investigator appointed to assist in investigating or reinvestigating the case when he was preparing for the 2004 penalty phase. He talked to the same three family members, Bobbie, Albert and Aunt Becky that bad testified at the 1998 trial. He did not go to North Carolina or Michigan, or hire an investigator to do so.

Mr. Colon was asked if he did any additional investigation to prepare for the 2004 penalty phase. He responded, "I don't believe I did, other than reviewing our file, the record, the transcript, and I decided to proceed with the same - - same type of defense." Mr. Colon went on to say "I - - I believed in our defense. I thought our arguments were - - were solid." (EH March V4/ 554). Mr. Colon was asked if he did any additional work to add to the body of work he had dealing with the issue of CODA. He responded, "No, I did not. As I said before, I thought that what we had developed was a good strategy and was a good defense. I mean anything can be further developed or you always can do a lot more if –if—if—if you really want to. I felt that we were okay with what we had. And, you know, surely looking back now, I wish I would have hired somebody that would come in and provide further testimony to see if it would help. I mean, it was a close vote, seven to five. So could it have made a difference, I don't know. But now I wish I would have done it." (EH March V4/559-560).

Testimony of Nancy McKenzie from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 561 – 597.

The defense called Nancy McKenzie as a witness. Ms. McKenzie is a sign language interpreter, and she is the interim director for Communication Access Center for Deaf and Hard of Hearing in Flint, Michigan. McKenzie testified that they would interpret letters and other documents like that for people that walked in for assistance. Ms. McKenzie testified that she was a CODA, which is a child of deaf adults. Ms. McKenzie testified that she had met Tommy Woodel and his mother, Jackie, about twenty something years ago at a time when Mr. Woodel was about 10 or 12. Ms. McKenzie thought Jackie had come to her for some kind of financial assistance. Ms. McKenzie testified about her impression of Jackie. . She said, "Jackie seemed very immature, naïve, almost like a child herself." (EH March V4/568). She testified that she did not think that Jackie was being the parent in this situation. Ms. McKenzie testified that Jackie did not fit into the deaf community in Flint, Michigan. She explained, "I'm thinking probably - - some of it was due to her immaturity and as - - and most of the deaf people really couldn't sit down and have an adult conversation with her, so they just sort of rejected her." (EH March V4/571). Ms. McKenzie testified that Jackie had difficulty understanding things both intellectually and socially. Ms. McKenzie said that Jackie would talk about drinking alcohol, and Ms. McKenzie would confirm that maybe Jackie was drinking with the children present. Ms. McKenzie testified that she was not contacted by anybody from Mr. Woodel's defense team prior to 2005. Ms. McKenzie agreed that she would have been willing to talk to a lawyer if she had been contacted in 1998 or 2004 and she would have been willing to come to court and testify about the same things she testified to at the evidentiary hearing.

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Testimony of Thomas J. Kerwin from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 598 – 648.

The defense called Thomas J. Kerwin as a witness. Prior to his retirement, Mr. Kerwin worked at the Gennesy County Community Mental Health Center in Flint, Michigan. Mr. Kerwin has a Masters Degree in Counseling. He said they provided psycho therapy in the general sense of the term. He testified that Mr. Woodel was 12 years old when he first came to them for their services. Mr. Kerwin was asked what his overall impression was of Tom. He testified that he questioned why Tom was there. He said that Tom was not doing to badly in school and that the school did not refer Tom to them. Mr. Kerwin was asked about his overall impression of Mr. Woodel's mother Jackie. He testified that he began to realize that Jackie was roping her son in here. Mr. Kerwin testified that the first two times he saw Tom he had come to the counseling session without shoes. He testified that his theory about this was that this was an attempt by Tom's mother to block any attempt by Tom not to show up for treatment. Mr. Kerwin testified that he was stunned that Jackie was trying to get Tom out of the house. He agreed that he came to the conclusion that the problem wasn't Tom, but it was Jackie.

On cross examination, Mr. Kerwin testified that he felt Thomas' mother was an unfit mother based upon his contact with her. Mr. Kerwin agreed that on a quarterly summary treatment plan he had written that Tom is a controlling, passive aggressive individual, also manipulative. Mr. Kerwin testified that his assessment was inaccurate and once he got to know Tom, he found that he really wasn't controlling and manipulative.

Mr. Kerwin testified that he didn't think he was contacted by any lawyers on hehalf of Mr. Woodel in either 1998 or 2004. He testified that he would have come to court if he had been contacted by the lawyers and would have been willing to give the same testimony that he gave at the evidentiary hearing.

Testimony of Robert F. Alward from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 653 – 684.

The defense called Robert F. Alward as a witness. Tommy Woodel is Mr. Alward's nephew and Jackie is his sister. Mr. Alward testified that his father liked to get drunk, and he got drunk two or three times a month. Mr. Alward testified that his father had a temper, and he did see his father hit Jackie on the ear that had her hearing aide. Mr. Alward testified that he remembered one time that his father was stomping or jumping on his mother. Mr. Alward testified that neither of his parents signed and he agreed that this made it hard for him to do things with his parents. Mr. Alward testified that he went to the Lutheran School for the Deaf when he was four years old, and then he went on to the Michigan School for the Deaf. Mr. Alward testified that his sister, Jackie, came to the Michigan School for the Deaf when she was about fourteen, and other students at the school teased her and made fun of her. Mr. Alward testified that at some point, Jackie became a day student at the school. He testified that she would skip school and go down to downtown Flint where she would hang out with hearing people. Mr. Alward agreed with counsel that downtown Flint was known for drinking and sex.

Mr. Alward was asked if he was embarrassed about Jackie. He answered affirmatively, and said she would go downtown without any teeth in, and she would carry a flask of whiskey with

her in her purse. She was seen by some of his friends drinking in church. Mr. Alward was asked about his Mother Edna and he testified that his mother had shot an Indian man who she claimed wanted her hair. On cross-examination, Mr. Alward testified that his mother was forced to take the life of someone who was trying to harm her. Mr. Alward testified that if he had been contacted in 2004, he would have come to Court and said the same things he did at the evidentiary hearing.

Testimony of Jessie Church from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 689 – 708.

The defense called Jessie Church as a witness. A sign language interpreter was used to interpret Mr Churches answers from American Sign Language to English. He testified that he knew Albert Woodel beginning in 1974. Mr. Church testified that Albert liked to get drunk a lot. Mr. Church was asked about Albert's reputation in the deaf community. He agreed that Albert was known to be a thief and a liar. Mr. Church testified that Albert ignored his children. He testified that Albert was the treasurer of the deaf fishing club, and he stole money from the club and never paid it back. Mr. Church testified that if had been subpoenaed in 2004, he would have come to court and said the same thing.

Testimony of Bonnie Holland from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 709 – 728.

The defense called Bonnie Holland as a witness. She knew Mr. Woodel when he and Christina were living in Michigan. Mr. Woodel was in a relationship with Ms. Holland's niece

Christina Stogner. Periodically, Mr. Woodel and Christian lived with her. She testified that Mr. Woodel interacted with her children well and that he treated Christina very well. She testified that she was drinking heavilty at the time that Mr. Woodel and Christina lived with her,and Mr. Woodel told her she should think about quitting drinking. He was concerned about her children. Ms. Holland testified that she knew Mr. Woodel's mother Jackie. She stopped by Jackie's house after she was separated from Don Bigelow, and she said there were pictures on the wall with faces scribbled out. She testified that she also knew Mr. Woodel's brother Scott. After Mr. Woodel was arrested and incarcerated for these crimes, Scott entered into a relationship with Christina, and they had a child together. She testified that if she had been contacted by Mr. Woodel's lawyers in 1998 or 2004, she would have testified to the same things she testified about today.

Testimony of Annie Swan from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 729 – 749.

The defense called Annie Swan as a witness. A sign language interpreter interpreted her answers from American Sign Language to English. Ms. Swan lives in Belmont, North Carolina. Ms. Swan testified that Mr. Woodel used to socialize with her children when he was about seven or eight years old. She lived at the same apartment complex as Albert, Jackie, and the children. She testified that Jackie and Albert were both unfit parents. She testified that Albert was violent, had a bad temper,stole things, and got revenge on people. She testified that in Jackie and Alberts apartment they removed the doors to the bathroom, kitchen, and some bedrooms. Albert and Jackie drank every day. She remembered seeing Mr Woodel sitting in the bathroom for one or

two hours having trouble going to the bathroom. She thought he needed medical attention, but Jackie never took him. Ms. Swan testified that if sbe had been subpoenaed in 2004, that she would have come to Court and said the same thing.

Testimony of Linda Mattson from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 749 – 770.

The defense called Linda Mattson as a witness. A sign language interpreter interpreted her answers from American Sign Language to English. She married Albert Woodel in 1983, and they were divorced in 1986. She said Albert was a heavy drinker, and he stole things. He stole money from the deaf club. Albert was having an affair with Beverly when he was married to her. She said that Beverly was about 17 or 18, and Albert was maybe 50. She talked to Albert about Tommy taking her car without permission and putting out cigarettes on the carpet, but he did not do anything about it. She did not think Albert was a good father to Tommy. She was afraid of Albert and one time he slapped her when they had a big argument. She got an injunction to keep Albert away from her. Albert was known in the deaf community to be a liar. She testified that Mr. Woodel skipped school a lot, but Albert didn't seem to care. Ms. Mattson testified that if sbe had been subpoenaed in 2004, she would have come to court and said the same thing.

Testimony of Randolph L. Salle from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 776 – 789.

The defense called Lieutenant Randolph L. Salle, as a witness. Lt. Salle, is a correctional officer at Union Correctional Institution. He had an opportunity to supervise Mr. Woodel from April 200 through January 2003. He described Mr. Woodel as being respectful and compliant. Mr. Woodel got along with other inmates. He reviewed Mr. Woodel's disciplinary history and Mr. Woodel only had one disciplinary report. It was a contraband disciplinary report. Mr. Woodel had excessive stamps, a popsicle stick, and a latex glove. This happened before he arrived at Union Correctional , and Mr. Woodel has had no disciplinary reports since he has been at Union Correctional. Mr. Salle testified that If he had been contacted in 2004, he would have come to court and testified to the same things that he testified to today.

Testimony of Lisa Wiley from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 789 – 816.

The defense called Lisa Wiley as a witness. She works at Columbia Correctional Institution in Lake City, FL. She is a behavioral specialist for the Florida Department of Corrections, she testified that the working title was mental health specialist. She worked at Union Correctional from 1989 to 2005. She saw Mr. Woodel in mental health services from April 2000 to January 2003. Mr. Woodel's decision to seek mental health treatment was voluntary. Mr. Woodel was respectful, compliant and interested in resolving his issues when he was in his sessions. She testified that if she had been subpoenaed to come and testify in 2004 she would have given basicially the same testimony as she gave at the evidentiary hearing, but she would have had more detail because she probably would have had more memory of the interaction with Mr. Woodel.

Testimony of James Evans Aiken from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 817 – 859.

The defense called James Aiken as a witness. He is the president of James E. Aiken & Associates, Inc. They are a prison, jail, correctional consulting concern. He was contacted by CCRC to do an evaluation of Mr. Woodel to determine his institutional adjustment. Mr. Aiken was asked about Mr. Woodel's institutional adjustment. He responded, "His institutional adjustment was favorable and I say that from a security perspective. For a inmate to be incarcerated for the extended period between 1997 and 2004 and having only one write-up and that was not involved with systemic or random violence or potential for violence is highly unlikely. Inmates tend to be disruptive and then they level out as they get older. In his particular circumstances, he flat-linted all the way through in my candid opinion. (EH March V5/832. Mr. Aiken was asked if he had an opinion on how Mr Woodel has adjusted and will continue to act in confinement? He testified that, " He can be safely confined for the remainder of his life without causing undue risk of harm to staff, inmates, and the general public." (EH March V5/837.

Testimony of Scott Sisk from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VI, pages 863 – 896.

The defense called Scott Sisk as a witness. He is Mr. Woodel's half brother. They have the same mother, Jackie. Bobbie Woodel is his half sister. He had another half sister Julie, and a full brother , Charles. Charles died in a car accident and he died on his I6th birthday in an

drinking related car accident. Scott lived with several different family members as a child and was later placed in a children's home.

Scott was sentenced to prison the first time at age 18. He has been incarcerated several times since. He has had drug and alcohol problems since the age of 13. He has 4 children by 4 different mothers. Christina Stogner is the mother of his son Brandon. Christina also had a child with Mr. Woodel. He testified that he has not really been involved in being a father to his kids. When Scott was 10 or 11 years old, his mother and he lived with Roberto, a deaf Mexican that Albert had brought into the county. He testified that he was raped a few times by his mother's boyfriend Roberto. At that time be testified that his mother was drinking a lot. She would drink and then pass out. Scott was not contacted by an of the defendant's lawyers prior to the penalty phase proceeding in 2004. He testified that if he had been contacted in 2004 he would have been willing to testify.

Testimony of Gilberto Colon, Jr. from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VI, pages 896 – 1040 and Volume VII, pages 1043 – 1075.

On cross-examination Mr. Colon testified that he was the second chair at the 1998 trial for Mr. Woodel. He jointly worked the case with Al Smith. He was asked if he and Mr. Smith discussed a theory of defense or how they were going to proceed to defend Mr. Woodel at the guilty phase. Mr. Colon responded, "I think Al and I talked a lot about Tommy's case trying to figure out how could we deal with the brutality of this—of these murders and certainly we were aware of the alcohol situation and the fact that, you know, we –we had some major problems. So

yes, we were trying to figure how can we convince a jury that – that there was no intent to kill anybody; that this was a situation that developed during an alcohol induced, quote, unquote, coma, as the way we referred to it, because Tommy couldn't remember much about it. So, yes, we did on –on numerous occasions. " (EH March VI/905).

Mr. Colon agreed that the defense against premeditaton and the defense against felony murder were essentually based on the defendant's alcohol consumption. He agreed that the defense knew that one of the center pieces of the State's case was going to be Mr. Woodel's oral and tapcd confession to the dctectives. Mr. Colon was advised that a jury instruction was asked for and given on voluntary intoxication, but he did not have an independent recollection of it. At that time voluntary intoxication was a defense to a specific –intent crime. The underlying felonies were burglary and robbery. One of the underlying felonies in this matter was burglary, and Mr. Colon agreed that the State would have to prove that the Defendant has the specific intent to commit a crime either before hc went inside the trailer or while he was inside. Another of the underlying felonies was robbery and Mr. Colon agreed that the State would have to prove that Mr. Woodel intended to take some property he wasn't entitled to. The State asked Mr. Colon if the defense made the decision that they were going to argue voluntary intoxication for both premeditated murder and felony murder. He answered that hc was sure they did because that was all they had at the time.

Mr. Colon said that he had never hired a toxicologist in any case he had been involved with before 1998 to assist him in terms of making a presentation of voluntary intoxication and he had ncver thought about doing it. Mr. Colon testified that even after the Woodel trial in 1998 he

has never used a toxicologist for that purpose. He testified that he never will unless it involves something like a DUI where toxicology was an issue. In this matter to try to show the level of intoxication that Mr. Woodel had Mr. Colon testified that they had Tommy's statement and a girl named Jessica Wallace. Mr. Colon said it was his understanding that they could not find the other people that Mr. Woodel and Jessica were drinking with. They tried to find out if Mr. Woodel had purchased some alcoholic beverages from a nearby convenience store but they were not successful.

Mr. Colon testified that he was aware at the time that Mr. Woodel had given a taped statement and had actually written out a statement for law enforcement. He was aware that Mr. Woodel had written out that he had seven beers. He indicated that he did not give that much weight because people that drink a lot often minimize their drinking. In the taped statement he told the officers 7 or 8 beers. They did not have any other testimony to show that Mr. Woodel did in fact consume form that seven or eight beers. Mr. Colon testified that the fact that they did not have Mr. Woodel testifiy at the guilt phase of the trial in 1998 would indicate a decision was made that It would not be a good idea to put him on the stand. One of the factors they would have considered in terms of having Mr. Woodel testify was that the taped statement Mr. Woodel gave to law enforcement had Mr. Woodel in his own words saying that he was intoxicated. Mr. Colon agreed that their strategy was to argue that Mr. Woodel was not guilty of premeditated murder and the underlying felonies because of voluntary intoxication and if successful that would bring the matter down to second degree murder as a general intent crime.

Mr. Colon was asked about the fact that Bobbie Woodel testified at pre-trial and at the trial that Mr. Woodel told her that the reason he had taken several knives before he left and had taken Mr. Moody's wallet was to divert suspicion. Mr. Colon was asked if they had hired a toxicologist if they still would have had to explain that this Defendant did not have the specific intent to commit crimes even though he gave a rationale for his actions to his sister. Mr. Colon agreed that they would have.

Mr. Colon was asked about the statement that Gayle Woodel gave pretrial when she told the officers that when the Defendant was getting ready to voluntarily go with officers to be questioned he hugged her and whispered to her that the knife was behind the dresser. The defense did not make an ohjection or make a motion for mistrial when the State advised the jury in opening statement at the guilt phase, that they were going to hear Gayle Woodel, Mr. Woodel's ex-wife testify that these statements were made to her, Mr. Colon agreed that this was indicative of the fact that the defense believed Gayle was Mr. Woodel's ex-wife at that time. Mr Colon was asked if he remembered that after the jury was selected but before Gayle testified the State announced to Judge Pyle that it had discovered that Gayle was Mr. Woodel's wife at the time and therefore had to proffer her testimony. Judge Pyle did not find that was an exception to the spousal immunity rule and did not allow her to testify. In addition, the defense made an oral motion for a mistrial. He testified that he did not have an independent recollection of it, but he was sure they moved for a mistrial.

One of the allegations in the postconviction motion is that Mr. Colon was ineffective with regard to the penalty phase in 2004 because he allowed the same testimony that he told this

to Gayle to come out before the jury. The claim is that counsel was ineffective for failing to reassert the spousal privilege and allowing the Defendant to testify about what he told his wife. Mr. Colon was asked about what context Mr. Woodel was testifying to when he brought out in this testimony at the 2004 penalty phase that he had put the knife behind the dresser. Mr. Colon answered, "Well, now that I've read it its's refreshed my recollection . He – he was just trying to explain that it wasn't to keep the knife away from the police, but was to keep it away from his own child so the child would not be hurt with the knife. And actually he moved it several times two or three days after the murder and as he said in his statement if he was going to hide it, he would have done it first thing, not move it around to keep it away from this child." (EH March V6/941-942).

Mr. Colon was asked if this testimony by Mr. Woodle given at the 2004 penalty phase regarding why he hid the knife actually helped the defense based on the fact that the officers had already located the knife behind the dresser based on Mr. Woodel's taped statement. Mr. Colon answered, Right. Well, it would help us because if we let it go on just that they found the knife behind the dresser, then the jury would certainly conclude that he was hiding the knife and they would incorrectly conclude that he was hiding the knife to keep it away from law enforcement to further protect himself from – from being arrested or charged with this crime. Here, he explains why he kept it away because of the child's safety, not because of trying to prevent detection." (EH March V6/944-945).

Mr. Colon testified that Arthur White did not have any additional information to tell the jury that they were not otherwise going to hear other than that the Defendant had told him that he

fondled the female victim. Mr. Colon was asked if based upon the impeachment they did at the 1998 trial of Mr. White, he thought it was significant that the defense didn't bring out the fact that one of the five or six convictions of Mr. White was for a crime that involved dishonesty. Mr. Colon answered; "I can tell you that I always ask a defendant , if I know they have impeachables involving dishonesty , whether, in fact, they have any. Why I didn't do it in this case, I have no idea. I don't know if it was because the cross-examination was flowing well and he was coming across as an interested liar that I wanted to paint or whether I just basically got excited or maybe just forgot. Could it have been significant, I can only speculate. I – I -- don't know. Maybe it was, maybe it wasn't .But I certainly always ask that question, so I don't' know if I answered you question, but I've at least explained the whole situation the way I remember." (EH March V6/950).

Mr. Colon was asked who he called as a witness for the 2004 penalty phase. He said , Tommy's sister, Tommy's dad, Tommy's Aunt, and Dr. Dee. He was reminded that he also called Jessica Wallace, Leola Kilbourn and Lisa Kilbourn. Mr. Colon was reminded that the one witness he called at the 2004 penalty phase that was not called at the 1998 trial was Mr. Woodel and he was asked how that decision was made. He said that he didn't remember the details of it. He went on to say, "So it might have been as simply as, we didn't – we didn't do that well back then, I believe that you can actually tell your story and the jury can see the human factor in you, not only through you family members and friends and neighbors and Dr. Dee, but also directly from him. Humanize him in a somewhat inhumane murder. (EH March V6/974).

Mr. Colon testified that at the 2004 penalty phase they were able to convince Judge Roberts of four statutory mitigators . Mr. Colon was asked what statutory mitigators were considered proven by Judge Roberts. He answered, " Number one, that the defendant has no significant history of prior criminal activity. Number two, the age of the defendant at the time of the crime. Number three, the capacity of the defendant to appreciate the criminality of his conduct to conform his conduct to the requirements of law was substantially impaired. And Number four, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. " (EH March V6/977). Mr. Colon noted that the last three statutory mitigators mentioned were not proven at the first trial in 1998.

Mr. Colon testified that he felt comfortable that Dr. Dee was well prepared to testify to the jury regarding his client being a hearing and speaking child of deaf adults and how that would come into play in terms of his upbringing, his mental processes, his emotions and other matters.

Mr. Colon was asked if he felt that it would be necessary to try to go and locate an expert in the issue of dealing with a hearing and speaking child of deaf adults. He responded,
You know, that's a hard question to ask. I mean , maybe it should have been something I should have done, but, again, I – felt comfortable with the package." (EH March V6/1009).

The state asked Mr. Colon about the aggravating circumstance that the victim was particularly vulnerable. Mr. Colon remembered that the testimony about this came from the medical examiner and the victim's daughter. He was asked about the allegation that he should

have objected to the testimony of the victim's daughter and if he had a basis for objecting to her testimony. He responded," You know, I can't think of a - - of a basis to object to her testimony, but more importantly , we have the victim's daughter on the stand, the last thing I going to try to do is get – mess that up, you know, get in there and object and make me look like the bad guy in front of this jury when the daughter's talking about her mom's condition. So, no, I wasn't going to object to her testimony unless it went a lot further deep into a medical condition that was not proven otherwise. (EH March V6/1017.

Mr. Colon testified that he did not remember filing any type of pretrial motion in 2004 to try to exclude Arthur White's testimony and he went on to say that he could not think of basis to do that. Mr. Colon was asked if he thought about trying to keep out the testimony of the fondling. He responded; "Paul, all I remember what that both Al and I thought it was horrible that a mention of fondling would – would come into this case when there was no evidence of any type of sexual contact or abuse. The problem that I remember was that we did have a pair of panties that had been cut and tied in a knot, so I just - - remember that. I don't remember about any discussion of filing a pretrial motion to keep that out. And I don't know if we made an oral motion to keep it out. I just don't recall." (EH March V6/1021).

Mr. Colon reasserted that he did not remember even hiring Dr. McClain. Mr Colon agreed that that if Dr. McClane had information that be thought would be helpful, he would have thought about putting him on as an expert witness. Mr. Colon was asked if he considered looking at what is referred to as multi-generaltion patterns of alcoholism or abandonment or abuse or domestic violence. He replied, "--honest – honestly I don't recall even considering that.

Again, I thought that the package we had was sufficient , so, no, I never thought about that as a possibility." (EH March V6/1035). Mr. Colon testified that there was no testimony or evidence available that Mr. Woodel had any mental illness. He said that Dr. Dee looked for it but came up empty.

On redirect examination, Mr. Colon agreed that it was possible that Mr. Woodel's case was the second capital case he tried. Mr. Colon was asked again if he retained a mitigation investigator such as Toni Maloney for the 2004 penalty phase. He answered, I didn't – I didn't feel that it was necessary based on the package I was presenting. And, as I said before, looking back now, that may have been a bad idea." (EH March V7/1062).

Mr. Colon agreed the argument for the capacity to appreciate the criminality and conduct mitigator was based on the testimony of Dr. Dee and Mr. Woodel and he did no further mitigation on that for the 2004 penalty phase. Mr. Colon agreed that he also relied on Mr Woodel and Dr. Dee with regard to Mr. Woodel's emotional disturbance without doing any additional mitigation investigation. Mr. Colon agreed that the record shows he did no additional investigation on the other mitigators. Mr. Colon testified that he made no attempts to talk with Department of Corrections officials at UCI about Mr. Woodel's behavior at the prison.

Testimony of Dr. Alan Marcus from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VII, pages 1075 – 1221).

Dr. Alan G. Marcus, a clinical psychiatrist who works with deaf and hard of hearing adults and their families, including CODA's, testified at the evidentiary hearing. He has a PhD.

in clinical psychology and he is a certified American Sign Language interpreter. He is also a CODA.

Dr. Marcus testified that the only book Dr. Dee read, Mother/Father Deaf, is an anthropological study. It is a scholarly book, but not a psychological review. He testified that there were numerous studies published and available in 2004 about CODA's and the psychological effects of growing up with deaf parents.

Dr. Marcus testified to a number of areas where Dr. Dee was mistaken or lacked a full understanding of CODA's and deaf culture. For example, a CODA's first language is sign language. Spoken English is there second language. He noted that Dr. Dee had discussed the lack of emotion in the defendant's vocalization. Dr. Marcus found that significant because when people speak in their second language there is a diminished ability to express their feelings. Dr. Marcus said that when he interviewed the defendant in sign language, "...I thought I was talking to somebody different. He was much more in touch with his feelings. He cried several times." (EH March V7/1088). . Marcus concluded that Dr. Dee did not totally understand the profound effect of having two deaf parents had on the defendant.

Dr. Marcus was asked to sum of the story of Mr. Woodel and his deaf parents. He responded, "Tommy and Bobbie are the result of a perfect storm. In the sense that you have two deaf people who, because of their deafness, plus other family dysfunction and other events in their lives that made it very difficult for them to be successful, come together, and unfortunately have children when they themselves don't know how to even take [sic] them of them – their own

self. And give birth to two, three children depending on how you look at it, and are unable to really raise these children and take care of them; never mind taking care of themselves. And so it's a -- it's a perfect tragedy." (EH March V7/1134- 1135).

Testimony of Margaret Russell from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VIII, pages 1226 – 1282).

The defense called Mr. Woodel's Paternal Aunt, Margaret Russell as a witness. She agreed that she was sometimes referred to as Becky. Albert is her brother. She testified in 1998 and 2004. In 1998, she believes that she spoke to Mr. Colon for the first time on December 7 in the Courtroom. She said they arrived for the weekend and they spoke with Al Smith over the weekend, but they did not speak to Mr. Colon on Saturday or Sunday. On that weekend, Al Smith came to the hotel and spoke to Bobbie, Lisa, Albert, and her. Bobbie translated for Albert, or that wrote everything out. With regard to the 2004 trial they met with Mr. Colon the night before the trial. Her brother, Albert, Bobbie, Bobbie's boyfriend, Larry, and her went to Mr. Colon's office. Again either Bobbie translated for Albert, or they wrote things down. He talked to all of them in the same room. In 1998 they had met with Dr. Dee in a Denny's restaurant. She did not remember if Al Smih was present when they were interviewed by Dr. Dee at Denny's. Gil Colon was supposed to call them over the weekend in 1998 but he did not do so. She was asked if she thought Albert knew how to be a father. She responded, " I don't think be knew how to be a father. Coming out of the school for the deaf, he never had the responsibility of raising a child and I don't want to say selfish. I don't think he knew how to be a father." (EH March V8/1242). She testified that he was not a good father and he passed out deaf cards for

money. Ms. Russell testified that if she had been asked the same questions in 1998 or 2004 she would have given the same testimony she gave at the evidentiary hearing.

Testimony of Dr. Daniel Buffington from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume I, pages 9 – 91).

The defense called Dr.Daniel Buffington , who practices in the field of clinical pharmacology. He is on the faculty at the University of South Florida College of Medicine. Dr. Buffington described an alcohol related blackout as follows: "An alcohol-related blackout s actually a cognitive phenomenon where the individual can be functioning, talking, having thought process, having behaviors and have no recollection of them at a later point in time. There's partial and complete. In a complete, the individual may have absolutely no recollection. And in a partial, it's very common that individuals describe a partial blackout like a movie scene or like snapshots that just appear in a sequence with a consistent flow." (EH May V1/16).

. Dr. Buffington agreed with defense counsel's that someone in a black out could be walking and talking, conscious, but have no memory of what they're doing. In the interview he had with the Defendant, Mr. Woodel was able to describe previous blackouts. Dr. Buffington put together some risk factors that Mr. Woodel would have for an alcohol-inducted blackout. The first factor is family history and genetic predisposition. The Defendant had a significant genetic predisposition to three generations, his, his parents, and his grandparents. The Defendant recalls using both alcohol and marijuana at approximately 14 years old. Alcohol was his substance of choice and at an early age he was consuming high volumes for the purpose of impairment. There is a significant increased risk for hearing impaired and children of hearing impaired adults for

increased propensity for substance abuse. Dr. Buffington testified that deaf individuals and children of deaf individuals. Another high risk factor are emotional stressors. Dr. Buffington said that the Defendant's testimony was that he was a binge drinker during that time due to his finances. Dr. Buffington testified that alcoholism is a chronic condition not chronic everyday consumption of alcohol. Dr. Buffington testified about the effects of the quantify of alcohol consumed, ...As you begin to increase up from over .09 to .25, you begin to have the cognitive effects take place as well as physical effects that we observe. So from a progression we go from sobriety and a minor degree of impairment to euphoria to now we bave actually confusion, all the way up to stupor, and even into a coma. And at significant levels alcohol actually can be fatal so we refer to that a alcohol poisoning." (EH May VI/31). Dr. Buffington further testified that, 'With progressive blood alcohol concentrations we see intoxication that individuals have behavior disinhibition and violence is a common factor with higher levels of blood alcohol, a know complication. It's also associated witb chronic alcoholism, the - - related to rapid increase in blood concentration, so. " (EH May VI/33).

Dr. Buffington testified that he was asked to calculate Mr. Woodel's blood alcohol level at the time of the crime. He provided a lower estimation of 12 beers to an upper estimation of 24 beers consumed during the post-work period. Dr. Buffington reviewed the voluntary intoxication instruction used in 1997 at Mr. Woodel's trial, and he agreed that Mr. Woodel would meet the criteria for voluntary intoxication. In his opinion, Mr. Woodel was incapable of forming the specific intent due to his intoxication. Dr. Buffington testified that the Defendant's drinking or controlling his drinking was not a choice for him. Based on the concentrations of alcohol he was taking at the time of the crime, alcohol was controlling the Defendant. On Cross-examination,

Dr. Buffington testified that the level of the Defendant's intoxication had rendered him incapable of forming the premeditation require for first-degree murder.

Testimony of Robert Norgard from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume I, pages 92 – 187) and Volume II, pages 190 – 236).

The defense called attorney Robert Norgard as a witness. He testified that he has conducted 213 trials and 76 of those were homicide cases. 32 of the homicide cases involved the State actively seeking the death penalty. He has handled about 5 direct appeals of death penalty cases. He has been qualified about 15 times to testify as an expert on prevailing norms among capital defense attorneys. He is also became hoard certified in criminal law in 1995. He testified that he was familiar with the 1989 and 2003 ABA Guidelines.

Mr. Norgard was critical of the defense for their failure to independently investigate the criminal record and potential deal of Arthur White, the "jailhouse snitch." Mr. Norgard stressed the importance at looking at what kind of a plea agreement a jailhouse informant received. Mr. Norgard testified, "... in my opinion it's a significant red flag if you look at what a jailhouse informant is charged with and if you look at it and on its face the person received an extremely favorable plea agreement, like I said, if you did deeper I think you'll find that, you know, certainly there were at least some efforts by somebody to bring up the fact that he's a witness in a capital case." (EH May V1/106).

Mr. Norgard was asked about the testimony of Arthur White in this case that there was fondling of the victim Bernice Moody. He was asked if the prevailing norms require an attorney where there's no charge of sexual battery to file a motion in limine to keep that obvious prejudicial information out. He testified that "... in this particular case where you have a situation where there - - you know, Mr. Woodel was not charged with sexual battery or any sexual offense, wbere the only evidence directly of any type of action of that nature was from the jailhouse snitch, I tbink that it was even more important to file a motion in limine as it related to the penalty phase in this case because although a jury in a penalty phase is allowed to hear relevant facts about the nature of the crime, in this instance where sexual battery was not a crime that was charged, where it want not an aggravating factor, in essence, what would have come out was a non-statutory aggravating factor, and I think under those circumstances, the prejudice substantially outweighs any relevance to that and so tbat would be one of the major bases for a claim under 90.403." (EH May V1/108).

Mr. Norgard was asked about the prevailing norms regarding the investigation and presentation of the voluntary intoxication defense which was a defense in 1998 at the time of Mr. Woodel's trial. With respect to the use of an expert testimony Mr. Norgard testified that it would be important for a capital defense attorney in 1998 to at least investigate to retain an expert in this area and utilize the testimony if it was favorable. Mr Norgard was asked if it was reasonable counsel to just rely on the perceived knowledge a jury would have about people that are intoxicated. Mr. Norgard answered, "In my personal experience, most jurors do not have the level of sophistication to really know about alcobol and the effects of alcohol, and particularly the effects of long-term alcohol abuse." (EH May V1/110).

Mr. Norgard testified that you can't make a tactical decision as to whether to hire an expert unless you've done your homework to begin with. Defense counsel asked Mr. Norgard about prevailing norms in 2004 with regard to the penalty phase. Mr. Norgard agreed that it would be important to present expert testimony about the effects of alcohol on the brain and behavior as it relates to mitigation instead of just relying on the jury's own knowledge.

Mr. Norgard testified that it's important to have an expert to testify about the concept of addiction and that it's actually a genetic process. He agreed that this is where a multigenerational history of the defendant would be important. He testified, "And that's where the expert would come in to tie that all in to show that why that's significant, why there's this predisposition, why there's the genetic issues involved, why there's the environmental issues involved in being around that type of environment." (EH May V1/115).

Mr. Norgard was asked about a difference in the 1989 and the 2003 guidelines. There is some language in the 2003 guidelines that requires using a specialist instead of just a general sense expert. He responded, "There, there was that subtle change. I think if you - - just from a practical standpoint, I think that, yes, the ABA Guidelines may have involved in change, but frankly , in terms of what was being taught through the death penalty training is the concept of a specialist existed long before that change in the ABA guidelines." (EH May V1/115). He said it would have gone back to the 1980's.

Mr. Norgard was particularly critical of defense counsel for the total lack of effort in consulting and or retaining a CODA (child of a deaf adult) expert. Mr. Norgard testified, "And, you know, I've reviewed the penalty phase testimony of Dr. Dee and, you know, I respect Dr. Dee. I used him a lot. But the idea that the expert sits up there and says, well, I didn't know anything about it, but I read a book and here's what I read, to me that's not what you want to present to a jury. " (EH May V1/117). He testified that Dr. Dee's testimony was disorganized and unfocused. Mr. Norgard opined that the CODA background of the defendant "... is something that's so unique, so unusual, that you needed somebody that has that expertise and training." (EH May V2/199).

Mr. Norgard was asked it part of the training of a defense attorneys are given at the courses they are required to attend would include that a mitigation investigation should include social history, a family bistory, a biological history, and psychological history of the client and his family. Mr. Norgard answered, " I would even state it broader than that. I mean, I would state it as broad as you need to investigate any and all aspects of your client's life record, history, to a certain extent, getting into the multigenerational research into the case, investigation into the case. Simply because that's the requirements of the U.S. Supreme Court in terms of what's possible mitigation." (EH May V1/118).

Mr. Norgard was critical of defense counsel's basic lack of investigation. He testified " ... the part that just really boggles my mind about the whole situation is that a basic penalty phase investigation would start with the parents. And the first contact with the parents you would have known they were deaf whether your client told you or not, so. I mean, tbat's the part that,

you know surprises me about the late discovery of it." See pages 193 -194, transcript of evidentiary hearing held on May 11, 2011 to May 13, 2011, Volume I.

Mr. Norgard was asked if Mr. Colon had put on an expert at the penalty phase and gained that additional testimony, that additional insight to the jury, do you believe he would have maybe had a different result?" Mr. Norgard responded, "Yes, I do. I mean, you know, one of the things, you know, really just bothers me about this case is that, you know, here you had an expert, Dr. Dee, who essentially quoted and paraphrased from a book about CODA, spoke in very general terms about what the psychological testing showed as to character aspects of Mr. Woodel, but did not address the issue of alcohol, how that impacted. Mr. Woodel specifically in terms of his psychological background and his characteristics. You know, a jury , you know, heard none of that and I think that's important." (EH May V1/161).

Mr. Norgard talked about what he would have done in 2004. "What I'm - - what I'm saying is that back in 2004, I would have had Toni Maloney, I would have given her adequate time, I would have had Toni Maloney hunt high or low for a CODA expert. And as she testified to, she's very good finding experts." Number two, what I would have done is - - and I've done this with Toni Maloney where we've come across very unique specialized things where she and I have gone over to the USF medical library and thoroughly researched very, very narrow topics to find articles.. And as she testified to , if she had been given the time, she would have done an exhaustive search of materials ot help support the expert testimony." (EH May V2/199 -200). .

Mr. Norgard acknowledged that he was also asked to look at an issue in the motion for post conviction relief that dealt with the failure at the penalty phase of defense counsel to object in any fashion to the testimony of Bernice Moody's daughter concerning the aggravator that deals with the disability that Bernice Moody would have suffered. Mr. Norgard responded, "...I think there was deficient performance of counsel in not objecting to something that was hearsay and called for expert testimony. " (EH May V2/216). Mr. Norgard was asked about what impact he thought such a deficient performance would have on the jury. He answered that he didn't think it would be major because given her age alone, the jury could have found that she was particularly vulnerable.

The Court asked Mr. Norgard who Mr. Colon called at the same penalty phase that was not called at the first penalty phase. Mr. Norgard answered, " It was basically a duplicate. I mean, it was like the difference between trial one and trial two was Mr. Woodel testifying." (EH May V2/222).

The Court asked Mr. Norgard if you got a 12-0 jury recommendation if that would indicated you should do some more background work and call some more witnesses. Mr. Norgard responded, "I-- I agree with that 100 percent. I mean,you got blanked. I mean, you know, what you had didn't work and I'd be looking at every possible way I could --could to enhance what I did the first time." (EH May V2/222).

The Court noted that Toni Maloney was not contacted for the second trial. The Court asked Mr. Norgard if Mr. Colon should have contacted Toni Maloney. Mr. Norgard responded,

No ifs, ands, or buts about it. I mean, presumably the motion for continuance was made in good faith. It was based on the fact their mitigation specialist -- you know, there's no real excuse forbringing in a mitigation specialist that late, but the mitigation specialist is saying I need to do this, this, or this. She moved for continuance on it, you lost. Then by a miracle you get a reversal and, you know, it would -- I mean, it boggles my mind that you wouldn't pick up right there and say, Toni, you've got that chance that the judge denied us when he denied that continuance motion." (EH May V2/223- 224).

Testimony of Phillip Henry from Transcript of Evidentiary Hearing, held on May11, 2011 to May 13, 2011, Volume II, pages 237 – 260).

The defense called Phil L. Henry as a witness. Mr. Henry is a Corporal in the Bartow Police Department. Mr. Henry agreed that be was involved in the arrest of and investigating the case of two robbery cases against Arthur White. Corporal Henry testified that Arthur White contacted him because he wanted substantial assistance with regard to the two robbery cases that were pending in 1999. Corporal Henry testified that he can't guarantee somebody that they will get a lesser prison sentence but, he can tell them that he is going to talk to the State Attorney's Office and let them know what kind of things they did to help. Corporal Henry agreed that Arthur White also had his girlfriend call him and offer to do some stuff. Corporal Henry testified that he didn't want to use Arthur White or his girlfriend. Mr. White seemed to be most concerned about the robbery case involving Wal Mart. Corporal Henry testified that Mr. White asked him to contact ASA, Wallace because he had indicated that he knew something about a murder case. Corporal Henry was asked by the State on cross examination if he knew at the time that the

defendant had asked to speak to Mr. Wallace that the defendant had already testified in 1998 in a first degree murder trial. Corporal Henry replied that he didn't know about that. Corporal Henry testified that he never followed up in contacting Mr. Wallace based on Mr. White's request. Corporal Henry testified that Mr. White never did do substantial assistance for him.

Testimony of Leola Kilborne from Transcript of Evidentiary Hearing, held on May11, 2011 to May 13, 2011, Volume II, pages 260 - 275).

The defense called Leola Kilbourne as a witness. Ms. Kilbourne had worked with Mr. Woodel at the Pizza Hut on Highway 192 in Kissimmee. Ms. Kilbourne also lived in the same trailer park as Mr. Woodel and she rented a trailer to Bobbie, Mr. Woodel's sister, where Mr. Woodel was also living. Ms. Kilbourne agreed that she testified in both Mr. Woodel's 1998 trial and the 2004 trial. Ms. Kilbourne testified that she testified as a character witness for Mr. Woodel. Defense counsel asked her if either in 1998 or 2004 she sat down with the trial attorneys, Al Smith or Gil Colon, to go over her testimony. She replied, "I didn't really sit down with them. We spoke on the elevator coming up to the courtroom." (EH May V2/263). Ms. Kilbourne did not remember them saying that there was anything specific that they were going to talk about when she gave her testimony. Ms. Kilbourne said that she undersood that there was a place behind the hack of the Pizza Hut where some of the younger workers would go and party after hours. Ms. Kilbourne imagined that Tom was involved with that group. Ms. Kilbourne testified that after Mr. Woodel was arrested, Bobbie, his sister came back to Florida and was extremely upset. Bobbie's reaction was so extreme that Ms. Kilbourne was concerned for her safety. Ms. Kilbourne was asked if the trial lawyers had asked her about drinking at the Pizza

Hut about Bobbie's extreme reaction to Mr. Woodel committing the murders and the fact that Mr. Woodel had been alone for the holidays prior to the murders, would she have given that same testimony back in 1998 or 2004 as she was giving today. Ms. Kilbourne replied that she would have given the same testimony. Ms. Kilbourne agreed on cross examination that she had given positive testimony about Mr. Woodel at the 1998 and 2004 trials. She testified that Mr. Woodel was very helpful and conscientious, and dependable. She had testified that he was gentle with Bobbie's baby; that Mr. Woodel was quiet, soft spoken, kind and intelligent and she had never seen him angry.

Testimony of Bobbie Hermes from Transcript of Evidentiary Hearing, held on May11, 2011 to May 13, 2011, Volume II, pages 277 - 381).

Defense called Bobbie Hermes as witness. Ms. Hermes is Mr. Woodel's sister. Ms. Hermes was called as a witness at both the 1998 and 2004 trial. The first person that contacted her in North Carolina about the case was Mr. Wallace from the State Attorney's Office. She testified that she was subpoenaed by the State for the 1998 trial. She testified that the State made her travel arrangements. On her first night back in Florida, she met with an investigator from the defense named Toni Maloney. She believed that she also had talked to Ms. Maloney when she was in North Carolina on the telephone. Ms. Hermes testified that Ms. Maloney had her sign a bunch of documents. Sbe said that this was a release to get records from the orphanage. The following day she said that she met with Attorney Smith and she testified that she also talked to Dr. Dee, a psychologist. Ms. Hermes testified that she thinks she arrived in Florida for the trial on the Sunday night before the trial, which started on Monday. Ms. Hermes testified that was

present when the lawyers were interviewing her father. She testified that she was the one who was interpreting for her father. She said that tbis was difficult to do and she was asked why it was difficult to do. She responded, "Because when you're interpreting for someone they need to feel comfortable enough to answer and because my father and I have a relationship, that wasn't the case." (EH May V2/288. Ms. Hermes testified that she spoke up and said that they should get a sign language interpreter for her father. She said she was told that the Court would only pay for an interpreter for him while he testified. She testified that when she was interviewed, her father was in the room. She agreed that because her father was in the room, there were things that she would like to say, but she was not comfortable in saying.

Ms. Hermes testified that the first information she got about the 2004 trial was a letter from the SAO. She testified that she thought it was the defense that brought her down for the 2004 trial. She testified that she did not remember anybody from the defense team working with her in the year prior to the 2004 retrial, trying to get additional information from her about the family. She testified that nobody from the defense team ever asked her any kind of additional questions to try and find out more about her brother and her family history. Ms. Hermes recalled meeting with Mr. Colon in his office on the Sunday before the trial. Her father and her Aunt Becky were also present. She testified that she was interpreting for her father. She testified that basically Mr. Colon was going over what he was going to ask during the trial. She testified that she was in the courtroom when her father testified in 2004. Ms. Hermes testified that sbe was afraid of her father because he had a temper. She agreed that she had heard of him pistol whipping deaf people. Ms. Hermes was asked about her father's third wife, Beverly. She testified that she met Beverly when she was in high school and that Beverly was maybe three

years older than ber. She testified that her brother, Mr. Woodel had feelings for Beverly and that at one time they had been dating. She testified that Tom carried a picture of Beverly in his wallet. She testified that after her father and his second wife, Linda, split up, her father came to live with her Aunt Becky in Pennsylvania and that Tom also came to live there. She testified that on weekends, her father would go to Washington, D.C. to Galudet University to see Beverly. She testified that there came a point in time where her Aunt Beeky asked her father to spend more time with his kids. She testified that she remembered a time when her father was supposed to go away for the weekend to Galudet University and take Tommy with him. Tommy was later found hiding in the closet. Her father didn't want his son Tommy to go with him to see Beverly.

Defense counsel asked Ms. Hermes if her father did anything else to make money other than being a mechanic. Ms. Hermes testified that her father used to assist Mexicans crossing the border. The Mexicans that he assisted in crossing the border were deaf. In time, there might have been as many five or six Mexican's staying at their residence. Ms. Hermes testified that as a child growing up, it was clear that they were never to speak of their father's activities involving the deaf Mexicans. Ms. Hermes testified that in spite of the fear of her father, if she had been asked these same questions, she would have given the same testimony in 1998 and 2004, including tbe testimony about the deaf Mexicans.

Testimony of Arthur Wbite from Transcript of Evidentiary Hearing, held on May11, 2011 to May 13, 2011, Volume III, pages 392 - 450).

The Defense called Arthur White as a witness. Mr. White indicated that he was currently in prison. He testified against Mr. Woodel at the 1998 trial and at the 2004 penalty phase trial.

Mr. White agreed that on January 1, 1997, Mr. Woodel got arrested and was put in I dorm on the bottom part of Polk County Jail along with him. Mr. White testified that he and Mr. Woodel talked about Mr. Woodel's case. Mr. White agreed that he wrote a letter to a detective that he had some information for him about Tom Woodel. Mr. White agreed that as a result of the letter, ASA, Aguero contacted Polk County Sheriff Deputy Allen Cloud to come and interview Mr. White. Mr. White was asked if on September 25, 1997, he was given a pretty sweet deal. He answered, "If you want to call it that. I still went to prison." (EH May V3/405-406). Defense counsel reminded Mr. White of the charges he was facing at that time. Defense counsel said, "There was a burglary, there was an extortion against witnesses, there's possession of cocaine, and there was some other misdemeanors and you end up getting - - they dropped the burglary and they reduced the extortion to a misdemeanor, harassing phone calls and you plead to a grand theft and you get - - and they drop - - do they - - do they drop the possession of cocaine or - - you plea to time served to the possession of cocaine?" (EH May V3/406). Mr. White responded that the charge for possession of cocaine was dropped. He agreed that he got 15 months in prison on the grand theft, concurrent and coterminous with a patrol violation. Mr. White was asked the following question by defense counsel: "And you get time served on the misdemeanors and then you get three months probation on the grand theft to be - - to be completed after you get released from prison. So, for somebody who's a habitual felony offender, that was a pretty good deal?" (EH May V3/407). . Mr. White responded, "I would say so, yes." (EH May V3/408).

Mr. White agreed that the prosecutor who gave him the deal on his sentence in case number 91-689 and 96-5889, which involved the hurglary that was dropped and the possession of cocaine, was ASA, Mr. Kirkland. Mr. White agreed that he was still finishing out his fifteen month sentence when he testified in 1998 at Mr. Woodel's trial.

Mr. White was asked if, when he testified in 2004, he responded that he had five felony convictions. Mr. White was asked by defense counsel how he knew he had five felony convictions then. He said that he knew this because he had been to trial and stuff on his other cases. Defense counsel introduced into evidence defense exhibit 55, which was an arrest charge in 2011. Defense counsel introduced defense exhibit 56 – 64, which were conviction records for Arthur White. Mr. White was asked by defense counsel if the true number of convictions he had in 2004 was actually 8 felony convictions. Mr. White said , Then that's what it is then, if that's what it say." (EH May V3/416)..

Mr. White agreed that at the time of the 1999 rohbery, he violated his felony probation by getting two new robbery charges. Mr. White was reminded that the State Attorney's Office reduced one of the robbery charges to a misdemeanor battery. Mr. White agreed that he didn't get convicted of the robbery. It was either reduced or dropped. With regard to the robbery at Wal Mart, Mr. White said that he got five years in prison followed by five years probation. Mr. White was asked if for two pending robberies, five years in prison was a pretty good deal, especially for someone with a number of prior convictions. Mr. White responded that he had seen other people get less. Mr. White was asked if he had picked up a new charge in 2011 for introduction of contraband into a detention facility. He agreed that he had. Mr. White agreed that that charge had been dropped.

On cross-examination, Mr. White agreed that in both the 1998 trial and the 2004 trial, that once he found out what Mr. Woodel was in jail for, he sought him out in hopes of getting

some information to help himself out. Officers came to speak to Mr. White on January 29, 1997, and he agreed that he advised them that he wanted a deal before he gave them more information about Mr. Woodel. Mr. White testified that he was never given any kind of deal as a result of giving information to the officers.

Testimony of Dr. Mark Douglas Cunningham from Transcript of Evidentiary Hearing, held on May11, 2011 to May 13, 2011, Volume III, pages 450 - Transcript of Evidentiary Hearing Held On May 11, 2011 To May 13, 2011, Volume III, pages 450 – 578, and Volume IV, ,pages 581 – 683.

The defense called Dr. Mark Douglas Cunningham as a witness. Dr. Cunningham is a clinical and forensic psychologist in private practice. Dr. Cunningham was retained by CCRC and he was asked by defense counsel what they asked him to do. Dr. Cunningham responded, "I was asked to do two things. I was asked to identify the presence of any adverse developmental factors that would be expected to have a formative influence in Tommy Woodel's life. I was also asked to consult with you regarding the presentation of mitigation information at sentencing and associated conceptualizations and arguments offered by the defense regarding what additional perspectives might have been offered." (EH MAY V3/465). Dr. Cunningham discussed numerous adverse factors in Mr. Woodel's background having a developmental influence on him. These included neurodevelopmental factors, family parenting factors, residential and school instability, ambiguous cultural identification, school performance problems; communication interpersonal deficit, teen onset polysubstance abuse,military failure,

premature marriage, institutionalization in early adulthood, and intoxication proximate to offense.

Dr. Cunningham testified that these factors illuminate the damaging and impairing influences on Mr. Woodel's choice and what the jury should consider with regard to a determination of his moral culpability. Dr. Cunningham testified that there is research that confirms that heredity is a major component on who becomes an alcoholic or drug dependent. Dr. Cunningham mentioned the risk factor that he spoke to Dr. Buffington about. This risk factor was an increased risk of alcohol and drug abuse among deaf adults and also among CODAS, who are the children of those individuals. Dr. Cunningbam testified that there were relevant hereditary and genetic predispositions in Mr. Woodel's family background. Dr. Cunningham testified that heredity is a very significant risk factor for personality disturbance and personality disorder as well as for other psycbological disorders like depression, anxiety, and schizophrenia and that sort of thing. Dr. Cunningham testified that the jury did not get a well articulatcd discussion of damaging devclopmental factors. They did not get the anecdotal detail that would illustrate these developmental factors. He testified that this was one of the worse cases he had ever seen. He testified that Mr. Woodel moved 27 times by the time he was in middle childhood.

Dr. Cunningham described a flow chart illustrating the various factors impacting Mr. Woodel's psychological experience at the time of the offense. These factors included deficient and disrupted attachment, emotional and physical neglect, wiring related deficits, probable sexual abuse, abandonment and rejections and failures, parental drinking and inadequacy. Dr.

Cunningam testified that then Mr. Woodel got intoxicated and you have situational stresses impacting him including he's been fired from the second job shortly before this and /or has been working two jobs, and Christina is pregnant, and Gayle is coming with a child, and he alone for the holidays.

Dr. Cunningham testified that he made an individualized appraisal regarding the adjustment that Mr. Woodel was projected to have for the Department of Corrections. He concluded that it was very unlikely as Mr. Woodel sat in 2004 to commit serious violence in the Florida Department of Corrections if confined for life. The Court asked Dr. Cunningham if, with respect to part of what he was saying was, could he summed up as saying the defendant had none of the protective factors in his background to offset all of the risk factors that he had. Dr. Cunningham replied that that's correct. Dr. Cunningham was asked about what kind of people he thought would be needed in preparing for a capital defense in this matter. Dr. Cunningham talked about the importance of the mitigation specialist, the importance of a mental health evaluation, the importance of getting a toxicologist or pharmacologist. He also recommended that they absolutely needed a CODA expert.

The court asked Dr. Cunningham if his position would be that with regard to the second penalty phase, that even though Judge Roberts found that both statutory mitigators existed, had she had this information she possibly or likely would have given much greater weight to it. Dr. Cunningham agreed with that statement and said the jury would have as well.

Testimony of Dr. Mark Douglas Cunningham from Transcript of Evidentiary Hearing, held on June 3, 2011. pages 4- 177).

On cross-examination ,Mr. Wallace asked Dr. Cunningham about the fact that Mr. Woodel told his sister that he took two knives and Clifford's wallet to divert suspicion, and about the fact that the Defendant subsequently through the wallet in the garbage. He indicated to Dr. Cunnihgham that these actions demonstrated rational decision making by the Defendant with regard to his actions. Dr. Cunningham responded: "That, that behavior that he is taking those things into his house, the stupidity of that and the irrationality of it, is inconsistent with a highly rational I think I better do th is to divert any attention as if why would anybody be thinking about his anyway to divert any attention to the real cause of this event. And so in that sense , the totality of this, the drinking , the spotty recollections, the senseless nature of the murders, the irrationality of conduct in terms of avoiding being connected to this offense, all of those things are inconsistent with this highly rational explanation that he provides to Bobbi, or that she recalls. " (EH June, pages 33-34).

Mr. Wallace asked Dr. Cunningham the following question. "Are you indicating that Dr. Dee was not able to perform a competent evaluation, analysis, and testimony because he didn't talk to these people that you talked to?" (EH June, pages 47-48). Dr. Cunningham responded, "Dr. Dee was handicapped by not having extent of mitigation investigation by a mitigation investigator that I had the benefit of. And so the raw material, the building blocks of his assessment were significantly lacking. That's what he was communicating in the facts that he sent to defense counsel on November the 6th of 1998 as I recall that this, this really calls for an

intensive mitigation investigation to done of Tommy's childhood. He recognizes that his – the building blocks that he has are limited in nature. " (EH June, page 48).

ANALYSIS OF DEFENDANT'S CLAIMS

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard for determining ineffective assistance of counsel. To establish ineffective assistance of counsel, a Defendant must prove two elements. First, the Defendant must show that counsel's performance was deficient. The defendant must show that counsel's representation fell below an objective standard of reasonableness. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. Second, the Defendant must show that counsel's deficient performance prejudiced the defense. This occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "Unless a Defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687. The Strickland standard requires establishment of both prongs. Where a Defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. See Waterhouse v. State, 792 So. 2d 1176 (Fla. 2001). In addition, to prove ineffective counsel in the penalty phase, Defendant must demonstrate that but for counsel's errors he would have probably received a life sentence. See Rose v. State, 675 So. 2d 567 (Fla. 1996).

Brady Standards:

In his Motion, the Defendant alleges that there were multiple Brady violations. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.3d.2d 215 (1963). There are three elements a defendant must establish in order to successfully assert a Brady violation according to the United States Supreme Court decision in Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The three elements are: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." In Smith v. State, 931 So. 2d 790 (2006) the Supreme Court of Florida discussed establishing prejudice in a Brady violation. The Supreme Court stated: "To establish prejudice, the defendant must demonstrate that the suppressed evidence is material. The test for materiality is whether there exists a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial". In Smith, the Florida Supreme Court, quoting Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 2d 490 (1995), also added; " [i]n otber words, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Giglio Standards:

In his Motion. the Defendant alleges that there were Giglio violations. See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763,31 L.Ed.2d 104 (1972). A Giglio claim alleges that the prosecutor knowingly presented false testimony against the defendant. See Melton v. State, 949 So.2d 994 (Fla. 2006). In Guzman v. State, 868 So.2d 498, 505 (Fla. 2003), the Florida Supreme

Court discussed how a Giglio violation is established: "[t]o establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." The burden is on the State to prove that the presentation of the false testimony was harmless beyond a reasonable doubt. According to the Florida Supreme Court in Guzman v. State, 941 So.2d 1045, 1050-1051 (Fla. 2006); "[w]batever terminology is used, the dispositive question is whether the State has established beyond a reasonable doubt that the knowing use of perjured testimony, or failure to disclose the perjury once it was discovered, did not affect the verdict."

To better analyze the Defendant's claims, the Court will address them in the order they were presented in his Amended Motion.

CLAIM I

MR. WOODEL WAS DEPRIVED OF HIS RIGHT TO RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. WOODEL'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.

Claim I of the Defendant's Motion is divided into parts A, B, C, and D. The Court will discuss each of these parts one at a time.

A. Counsel's failure to present factual and expert evidence of the depth and psychological effect of Mr. Woodel's alcohol use which would have negated a finding of premeditation by the jury was deficient performance which fell below prevailing norms.

Counsel's failure prejudiced Mr. Woodel to the extent that confidence in the outcome is undermined.

The Defendant alleges that at his 1998 trial, counsel should have presented evidence and expert testimony to support the defense's argument that due to voluntary intoxication and psychological deficits the Defendant was guilty of either second degree murder or manslaughter because he did not have a premeditated design or plan to kill either of the victims, or did he intend to kill either victim. At the time of the Defendant's offense, voluntary intoxication was an affirmative defense to the crime of premeditated murder.

The defense did not call Mr. Woodel at the 1998 trial to testify regarding the amount of alcohol he had consumed. His confession indicated that he had consumed seven or eight beers on the night of the incident, but the defense believed that he had consumed much more than seven or eight beers. The testimony of Mr. Smith and Mr. Colon testified that they were not able to obtain more evidence to develop the extent of Mr. Woodel's intoxication. Mr. Angelo Wayne Tucci, a private investigator, was retained by the defense. Mr. Tucci, testified that basically the people he interviewed during his investigation was for the purpose of trying to corroborate Mr. Woodel's drinking on the night of the crime. He tried to dig up additional witnesses who saw Mr. Woodel drinking on the night of the incident. Jessica Wallace had told him some other men had been drinking with Mr. Woodel on the night of the incident, but she was not able to give bim a good enough description to locate these men.

The Defendant alleges that his counsel should have consulted a toxicologist and presented testimony by a toxicologist to discuss the effect of alcohol use on Mr. Woodel and rebut the State's evidence of premeditation. Mr. Woodel was represented at his 1998 trial by Allen R. Smith, Esq., and Gilberto Colon, Jr. Esq. The testimony of both attorneys at the evidentiary hearing indicated that Mr. Smith was primarily responsible for the Guilt Phase of the trial, and Mr. Colon was primarily responsible for the penalty phase of the trial. However, there was some sharing of the responsibilities with respect to both phases of the trial. Mr. Smith testified at the evidentiary hearing that he had never consulted a toxicologist, and it didn't cross

his mind to consult a toxicologist. Mr. Gil Colon, who was primarily responsible for the penalty phase. testified that he did not ever consider hiring a toxicologist or other similar type of expert to explain the effects of alcohol or to calculate Mr. Woodel's blood alcohol at the time of the crime. Mr. Colon expressed the opinion that he knew at least a good portion of the jurors knew what it was to be drunk and what effects that had on the drunk person. Mr. Smith testified that prior to the 1998 trial he was not aware of any defense attorney in Polk County using a toxicologist to come in and testify on the issue of voluntary intoxication. Mr. Smith also testified that he was not aware of anybody bringing in a toxicologist to support a voluntary intoxication defense at a capital murder trial. Robert Norgard, Esq., testified at the evidentiary hearing that it would be important for a capital defense attorney in 1998 to at least investigate to retain an expert in this area and utilize the testimony if it was favorable.

Dr. Cunningham, a clinical and forensic psychologist, testified at the evidentiary hearing extensively about the factors that put someone at risk for alcohol and drug abuse, and how this could be applied to Mr. Woodel. Dr.Daniel Buffington, who practices in the field of clinical pharmacology testified at the evidentiary hearing regarding alcoholic blackouts and the cognitive and physical effects of alcohol consumption. Dr. Buffington has a doctorate of pharmacy from Mercer University. Dr. Buffington calculated Mr. Woodel's blood alcohol level at the time of the crime. He provided a lower estimation of 12 beers to an upper estimation of 24 beers consumed by Mr. Woodel. In his confession, Mr. Woodel claimed that he had consumed seven or eight beers prior to his encounter with the Moodys. Dr. Buffington testified that the level of the Defendant's intoxication had rendered him incapable of forming the premeditation required for first-degree murder.

Mr. Angelo Wayne Tucci, a private investigator, testified that basically the people he interviewed during his investigation was for the purpose of trying to corrohorate Mr. Woodel's drinking on the night of the crime. He tried to dig up additional witnesses who saw Mr. Woodel drinking on the night of the incident. Jessica Wallace told him some other men or boys were drinking with Mr. Woodel, but her description of them was not sufficient enough for him to follow up on the matter. He also interviewed a guy at a 7- Eleven store to see if Mr. Woodel or any other person on the witness list had purchased any alcohol there.

The Court finds that counsel for the Defendant provided ineffective assistance to the Defendant to the extent they did not at least consult with a toxicologist or similar type expert to determine if such an expert could provide useful assistance to the defense with regard to their argument of voluntary intoxication and lack of premeditation on the part of the Defendant. Without such a consultation, counsel did not make a knowing and educated decision not to use a toxicologist or similar expert. However, despite this deficiency by counsel, the Court does not find that there is any reasonable probability that but for counsel's deficiency, the result of the proceedings would have been different. The State had a strong case against the Defendant. See the Court's discussion with regard to Claim 1D below. The Defendant's confession to law enforcement shows a recall of the facts of the offences, purposeful behavior in carrying out the offenses, and purposeful behavior to cover up tbe offenses. Even should the jury find that the Defendant lacked the premeditation necessary for first degree murder premeditated murder. the Court finds that he still would have been found guilty of first degree felony murder. The evidence supported a conclusion that Mr.Woodel committed an armed burglary of a dwelling with an assault or battery and armed robbery. Claim IA of the Defendant's motion is denied.

B. Failure to file a motion to suppress tbe statement of Mr. Woodel and /or obtain an expert on police interrogation tactics and/or argue to the jury that Mr. Woodel's manner of speaking was a result of the fact that both of his parents were deaf and not indicative of untruthfulness.

This claim was withdrawn by the Defendant.

C. Failure to raise spousal/marital communication privilege violated Mr. Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

During opening statements the prosecutor told the jury that Mr. Woodel whispered to Gaylel Woodel to hide the knife which was used as the murder weapon. There was not objection by trial counsel based on spousal privilege to the opening statement of the prosecutor. The State subsequently advised the trial court that it appeared that Gayle Woodel was still married to the Defendant. Ms. Woodel's testimony was proffered to the Court. The trial judge found that her statement fell under the marital communication privilege, and its admission was prohibited. Defense counsel asked for a mistrial, but the motion for a mistrial was denied.

In his Motion, the Defendant alleges that defense counsel failed to advise Mr. Woodel of the marital communicaton privilege and failed to assert the marital communication privilege prior to trial and/or opening statements. Additionally, counsel failed to lodge a contemporaneous objection when the state divulged the contents of the privileged communication failing to preserve the issue for appellate review. The Defendant asserts that reasonably competent counsel would have advised the client of the privilege and moved pretrial to assert the Defendants rights. The Defendant alleges the statement shows consciousness of guilt and intent to hide evidence prior to Mr. Woodel's admission to law enforcement that he had committed the crimes.

Both Mr. Smith and Mr. Colon testified that they were under the impression that Gayle Woodel was Mr. Woodel's ex-wife. Mr. Colon testified that it was definitely not a strategic decision to let that information come out in opening statements. Mr. Smith was shown Defense exhibits 44, 45, and 46 which were police reports.. He agreed that these police reports showed that there was evidence in the discovery that Mr. Woodel and Gayle Woodel were still married.

The Court finds that defense counsel provided ineffective assistance to the Defendant in not advising him of the marital communication privilege, not asserting the privilege pretrial, and not objecting when the State mentioned the communication in opening statements. However, the Court does not find that but for this deficiency of counsel the result of the proceedings would have been different, or that confidence in the fairness of the proceedings was undermined. The jury did not hear direct testimony from Ms.. Woodel about the matter. The jury did hear Mr. Woodel's confession where he admitted hiding the knife. The State's reference to what Gayle would say is not so prejudicial as to undermine confidence in the fairness of the trial. Claim IC of the Defendant's motion is denied.

D. Trial counsel failed to object to Arthur White's testimony claiming that Mr. Woodel told Mr. White that he fondled Mr. Moody, Further, trial counsel failed to effectively cross-examine Mr. White, a snitch with numerous prior felonies. Both of these failures violate Mr. Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

At the trial, Arthur White, a jailhouse informant, testified that Mr. Woodel had told him that he fondled Bernice Moody. The Defendant argues in his Motion that he was not charged with any sexual offenses of Ms. Moody, nor was fondling an element of the underlying offenses. The Defendant alleges that the prejudicial effect of the statement outweighs its probative value and cites Section 90.403, Fla. Stat. The Defendant alleges that counsel was deficient in not moving in limine to exclude this testimony and not objecting to the testimony when it was presented.

The defense also alleges that defense counsel's cross-examination of Mr. White fell below prevailing norms. The Defendant alleges that counsel did not do a thorough investigation of Mr. White's background, including the number of his previous convictions he had and promises made to him by the prosecution. The Defendant alleges that the State dropped charges against the Defendant on felony charges that the Defendant faced, and he received favorable sentencing.

When he gave his testimony Arthur White said he had been convicted of 5 or 6 felonies which understated his actual number of convictions. Mr. Colon testified that he did not do his own investigation to see how many convictions Arthur White had. Mr. Colon said the only investigation that he completed was asking the State if they had any certified convictions of Mr. White. Mr. Colon testified that he didn't have an independent recollection if Mr. Wallace, the Assistant State Attorney, had shown him certified copies of the convictions. Mr. Colon testified that having worked with Mr. Wallace for many years, he would have no reason to doubt the number of convictions that Mr. Wallace would have told him.

The Court finds that counsel provided ineffective assistance when they did not file a motion to exclude this testimony. The prejudicial effect of this testimony regarding fondling far outweighed the probative value of the testimony. Because this was a death case, there are heightened due process concerns.

However, as with Claims 1A And 1C, the Court does not find that but for this deficiency of counsel the result of the 1998 Guilt Phase proceedings would have been different. The Court does not find that these deficiencies undermine confidence in the fairness of the proceedings.

The case against the Defendant was very strong. The State had the Defendant's confession, the State had DNA evidence supporting it case against the Defendant, the toilet tank lid remains, Mr. Moody's wallet, the murder weapon (knife) was found where the Defendant said that he had hidden it. Claim ID of the Defendant's motion is denied.

CLAIM II

MR. WOODEL WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. WOODEL'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTSUNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION AND UNDER FLORIDA COMMON LAW.

Claim II of the Defendant's Motion is divided into parts A, B, C, D, E, F and G. The Court will discuss each of these parts one at a time.

A. Failure to conduct a reasonably competent mitigation investigation and failure to present mitigation.

The Defendant alleges that counsel failed to conduct a reasonable competent mitigation investigation. He argues that counsel failed to obtain a comprehensive social history, biological history, or psychological history of Mr. Woodel and his family. In his Motion the Defendant alleges that counsel " ... failed to obtain basic records on Mr. Woodel, including by but not limited to, birth records and other medical records, school records, employment records, juvenile

records, court records, divorce records, counseling records, orphanage records, records when he was in the Big Brother/Big Sister program, military records and others." The Defendant further alleges; Counsel failed to retain experts who were tailored to the needs of the case and rather relied on an "all purpose expert" to explain deaf culture, the effect of growing up as a hearng child with two deaf parents and the effect that had on Mr. Woodel's emotional/psychological development and ability to communicate." The Defendant also alleges that counsel failed to obtain records on Mr. Woodel's parents, aunts, uncles, grandparents and siblings and their background, including but not limited to , employment records, social security disability records, psychological records, medical records, accident records, prison/jail records, orphanage records, and others."Additionally, the Defendant alleges that counsel "--- failed to contact and secure the appearance of witnesses including but not limited to the maternal uncle, the father's prior wives, the mother's prior husband, Mr. Woodel's counselor when he was a teenager, Mr. Woodel's Big Brother in the Big Brother/Big Sister program, friends who know Mr. Woodel's father and mother and Mr. Woodel prior to the crimes, teachers, employers, corrections officers, the parent's ex-spouses and others" The Defendant asserts in his Amended Motion, " Because Mr. Woodel's attorneys failed to conduct a reasonably competent investigation of Mr. Woodel's background, they failed to present reasonably available mitigation to the jury and to link it to the crimes, including giving adequate weight to the statutory mental mitigators."

The Court's evaluation of Claim IIA involves the actions taken by defense counsel with regard to both the 1998 penalty phase and the 2004 penalty phase of Mr. Woodel's trials. However, the focus of the Court's discussion will be on the 2004 penalty phase. On direct appeal, the Florida Supreme Court affirmed Woodel's 1998 conviction but remanded the case to

the Circuit Court for a new penalty phase proceeding because Judge Pyle's order failed to evaluate each mitigating circumstance and failed to determine whether these mitigators are truly mitigating, failed to assign weights to the aggravators and mitigators, failed to undertake a relative weighing process and failed to provide a detailed explanation of the results of the weighing process. In preparing this Order, the Court was particularly concerned with how counsel used the experience of the 1998 penalty phase in preparation for the 2004 penalty phase.

In Wiggins v. Smith, 539 U.S. 510, 521,123 S.Ct. 2527, 2535 (2003), the United State's Supreme court discussed reasonable investigations and quoted the following language from Strickland.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

In Wiggins the court went on to say, " In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. See Wiggins v. Smith, 539 U.S. 510, 527,123 S.Ct. 2527, 2538 (2003),

In preparation for the Second penalty phase, Mr. Colon talked to three family members. Bobbie Hermes , Albert Woodel, and Margaret Russell. The same three people that testified at

the 1998 trial. He did not go to North Carolina or Michigan and he did not hire an investigator to do so. All he did was review records and proceed with the same type of defense. He did not hire Toni Maloney, or for that matter, any mitigation specialist to talk to family members and other potential witnesses. He acknowledged on redirect that it may have been a bad decision. He did no additional investigation or try to find a CODA expert. Mr. Colon said that "looking back, I wish I had hired somebody that would have come in and provided further testimony. " Mr. Colon was on notice that he had unique issues regarding his client.

The first jury made a 9-3 recommendation of death for the murder of Mr Moody and a 12-0 death recommendation for the murder of Bernice Moody. Despite these recommendations at the 1998 penalty phase, Mr. Colon failed to hire Ms. Maloney or any mitigation specialist to prepare for the 2004 penalty phase. Mrs. Maloney testified that she would have been available for the second penalty phase, and if she had been contacted, she believed additional investigation was needed. Mr. Colon's testimony at the evidentiary hearing was that he liked the package he had. He did no new investigation. Other than calling Mr. Woodel as a witness in the 2004 trial, he called the same witnesses that were called in the first trial. Mr. Colon did not consult with a toxicologist or similar professional to help the jury understand the role alcohol abuse played in Mr. Woodel's actions. A mitigation specialist could have developed a multigenerational history, which showed a pattern of alcoholism, a pattern of abuse and abandonment. The Court finds that counsel's performance fell below an objective standard of reasonableness with respect to Claim IIA of the Defendant's Motion. The Court finds that but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different, and Mr. Woodel may have received a life recommendation.

B. Failure to Ensure A Reasonably Competent Mental Health Evaluation

The Defendant alleges that; "Counsel failed to ensure that Mr. Woodel received reasonably competent mental health evaluation and failed to retain reasonably competent mental health evaluation and failed to retain reasonably qualified experts to determine the extent of Mr. Woodel's mental, emotional and psychological deficits due to his neglect and the abuse he suffered throughout his childhood. Counsel further failed to retain an expert to calculate Mr. Woodel's probable blood alcohol level and assess the effect of alcohol on Mr. Woodel's brain and thought processes at the time of the crime."

The issues raised by the Defendant in Claim IIB. have been discussed by the Court to a large extent with regard to Claim IIA. At the evidentiary hearing, Dr. Cunningham, a clinical and forensic psychologist, testified extensively about the factors that put someone at risk for alcohol and drug abuse, and how those factors could be applied to Mr. Woodel. Dr. Daniel Buffington, a clinical pharmacologist testified at the evidentiary hearing regarding alcoholic blackouts and cognitive and physical effects of alcohol consumption. Dr. Buffington calculated Mr. Woodel's alcohol consumption at the time of the incident to have been between 12 and 24 beers. Dr. Alan G. Marcus, a Clinical Psychiatrist who works with deaf and hard of hearing adults and their families, including CODA's, discussed the deficiencies in Dr. Dee's presentation with respect to the special problems faced by Mr. Woodel as a CODA. The testimony presented at the evidentiary hearing regarding the capabilities of Dr. Dee seemed to agree that he was often used and respected as a death penalty mental health expert in Polk County. The Court is of the opinion after reading the trial transcript of Dr. Henry Dee from the 2004 penalty phase, that Dr.

Dee made a determined effort to present as complete a mental health picture of the Defendant as possible. Considering his limited knowledge of CODA and the deaf culture, he did his best to try to convey to the jury how that factor impacted on Mr. Woodel.

However, after considering the testimony of Dr. Marcus regarding CODAs, the testimony of Dr. Buffington and Dr. Cunningham regarding the effects of alcohol on the Defendant, and other testimony the Court received involving multigenerational patterns of alcohol abuse, the Court is of the opinion that the defense did not present a reasonably competent mental health picture of the Defendant and was deficient regarding Claim IIB of the Defendant's Amended Motion. The Court finds that counsel's performance fell below an objective standard of reasonableness with respect to Claim IIB of the Defendant's Motion. The Court finds that but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different, and Mr. Woodel may have received a life recommendation.

C. Trial counsel failed to object to Arthur White's testimony claiming that Mr. Woodel told Mr. White that he fondled Ms. Moody. Trial counsel also failed to consider and/or offer an objective, scientific explanation of how Mr. Woodel's inhibitions would have been lowered by alcohol as an explanation for this behavior if the trial court would have allowed the testimony about fondling over defense objection. Further, trial counsel failed to effectively cross-examine Mr. White, a snitch with numerous prior felonies, who would have known information about the crime from news reports, including suggestions that Ms. Moody has been sexually assaulted.

These failures violated Mr. Woodel's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

The Defendant argues that counsel failed to object to Arthur White's testimony, or to effectively cross-examine Mr. White. The defense did not present testimony at the evidentiary hearing in furtherance of its claim that counsel did not consider and/or offer an objective scientific explanation of how Mr. Woodel's inhibitions would have been lowered by alcohol as an explanation for his beharvior. The concerns regarding counsel's failure to do an independent investigation of Mr. White's criminal history and to investigate the possibility of his having received a benefit for his testimony were discussed in Ground ID of the Court's Order and apply to Ground 2C as well. . In Ground lD the Court also discussed how the prejudicial effect of Mr. White's testimony regarding fondling far outweighed the probative value of the testimony and this also applies to Ground IIC as well. The Court finds that counsel was deficient in the penalty phase in 2004 just as in 1998 with regard to not filing a motion to exclude this testimony. The prejudicial effect of this testimony regarding fondling far outweighed the probative value of the testimony. Because this was a death case, there are heightened due process concerns. Particularly in light of the fact that the jury returned a verdict of 7 to 5 in favor of death in the 2004 penalty phase proceeding, the Court is concerned that but for this deficiency of counsel the result of the 2004 penalty phase proceedings would have been different. The Court finds that counsel's performance fell below an objective standard of reasonableness with respect to Claim IIC of the Defendant's Motion. The Court finds tbat but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different, and Mr. Woodel may have received a life recommendation.

D. Failure to File a Motion To Suppress the Statement of Mr. Woodel or obtain an interrogation specialist or confession expert to address the interrogation tactics of the investigators and explain Mr. Woodel's language skills/speaking style was deficient performance which prejudiced Mr. Woodel,

This claim was withdrawn by the Defendant.

E. Trial counsel failed to object to hearsay testimony about Ms. Moody's medical condtion which allegedly made her more vulnerable and was the basis for the aggravating factor of advanced age/particular vulnerability. Trial counsel's failures violated Mr. Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

In his Motion, the Defendant alleges, "Trial counsel rendered deficient performance by failing to object to the State's improper use of hearsay testimony to establish the aggravator of victim vulnerability due to age or disability. During the resentencing proceeding, the State offered the testimony of Maryann Richard , Ms. Moody's eldest daughter, to establish that Ms. Moody had broken her arm.

The court finds that this factor would have been shown even without this testimony of Maryann Richard. Ms. Moody was 74 years old, wore glasses, and had experienced a serious injury to her shoulder which continued to impact strength and physical ability. Additionally, Mr. Colon testified at the evidentiary hearing that as a matter of strategy he would not object to the medical testimony provided by the victim's daughter at the resentencing,. Ground IIE of the Defendant's Amended Motion is denied.

F. Failure to re-raise spousal/marital communication privilege violated Mr. Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The Defendant alleges that trial counsel failed to reaasert the marital communicaton privilege. The defense claims that counsel introduced testimony through Mr. Woodel at the 2004 resentencing regarding what he told Gayle about the knife. and the State asked Mr. Woodel a series of questions suggesting his statements to Gayle were made because his intention was to hide the knife from the police. At the evidentiary hearing, Mr. Colon testified regarding the tactical reason for presenting this testimony. The Defendant wanted to explain that he wasn't trying to keep the knife away from the police , but to keep the knife away from his own child. The jury was going to hear information about the hidden knife through Mr. Woodel's confession, and the Court finds that Mr. Colon's strategy was reasonable with regard to having Mr. Woodel explain his intentions with regard to the hidden knife. Even if it could be supposed that there was some deficiency by counsel with regard to this issue at the 2004 penalty phase, the Court does not find any real possibility that the result of the proceedings would have been different but for this deficient performance. Ground IIF of the Defendant's Amended Motion is denied.

G. Trial counsel rendered deficient performance in failing to adequately preserve for appellate review the claim that the trial court committed fundamental constitutional error in excusing for cause two Spanish speaking potential jurors and failed to object to the court's failure to provide a Spanish speaking interpreter for the potential jurors.

A review of the record shows that counsel did object to the exclusion of two hispanic jurors. In Woodel v. State, 985. So.2d 524, 528-530, the Florida Supreme Court found that counsel's objection was sufficient. The Florida Supreme Court determined that no error could be discerned even if counsel had provided support for a fair cross section claim. Ground IIG of the Defendant's Motion is denied.

CLAIM III

MR. WOODEL WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO DEVELOP FACTORS IN MITIGATION BECAUSE THE PSYCHOLOGIST RETAINED BY THE DEFENSE FAILED TO CONDUCT THE APPROPRIATE TESTS FOR ORGANIC BRAIN DAMAGE AND MENTAL ILLNESS, THIS VIOLATED MR. WOODEL'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

This Court finds that this claim is procedurally barred. Claim III of the Defendant's Amended Motion is denied. See Whitfield v. State, 923 So.2d 375 (Fla. 2005),; and Marshall v. State, 854 So.2d 1235 (Fla. 2003).

CLAIM IV

THE STATE VIOLATED THE CONSTITUTIONAL REQUIREMENTS OF BRADY V. MARYLAND AND ITS PROGENY, GIGLIO V. UNITED STATES AND ITS PROGENY, AND DONNELLY V. DECHRISTOFORO, DENYING MR. WOODEL H IS RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, THE STATE'S ACTIONS AND OMISSIONS PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

A. The Prosecutor misled the court during the Guilt Phase of Mr. Woodel's trial when it told the Court it had been unaware of and/or had not been told that Gail Woodel was still married to Thomas Woodel.

B. During the Resentencing trial, the State Attorney failed to disclose Brady evidence and violated Giglio when it offered untruthful testimony which it failed to correct when it allowed Arthur White to testify falsely about his prior record and lenient treatment on pending cases.

The Defendant alleges that the State violated Brady v. Maryland, 373 U.S. 83 (1963),and Giglio v. United States, 405 U.S. 150(1972), when it failed to reveal exculpatory information regarding Mr. Woodel's marital status and Arthur White's prior record, as well as a deal to obtain Mr. White's testimony at the 1998 trial and the 2004 penalty phase trial. . The Court does not find that the defense has supported allegations that there were Brady or Giglio violations. The defense has not show that the State suppressed favorable information from the Defendant, or that he was prejudiced. The Court finds that there was no showing by the defense that the State possessed any exculpatory information regarding Mr. Woodel's marital status which could not have reasonably been known to Mr. Woodel. Information cannot be deemed suppressed where the defense was or reasonably should have been aware of the information. See Owen v. State,

986 So.2d 534 (Fla. 2008). At the evidentiary hearing Mr. Colon agreed that police reports he would have received seemed to indicate that the Defendant was married. Tbe Defendant alleges that the State failed to correct Mr. White's allegedly false testimony that he did not get a benefit in exchange for his testimony as well as his testimony that he had only 5 or 6 convictions. The Court finds that the Defendant has not shown that the State made any agreement to provide favorable treatment in exchange for Mr. White's trial testimony or knowingly allowed him to testify to an incorrect number of prior convictions. Claim lV of the Defendant's Motion is denied.

CLAIM V

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED THOMAS WOODEL OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

As more fully explained in the Court's discussion with regard to Claim I of the Defendant's Amended Motion, the Court finds that the Defendant has not shown that the results of the 1998 Guilt phase would have been different but for the claimed deficiencies of counsel. The Court is of the opinion that the Defendant is entitled to a new penalty phase trial as more fully explained with regard to Claim IIA, Claim IIB, and Claim IIC, and a cumulative assessment of alleged deficiencies has been rendered unnecessary.

CLAIM VI

NEWLY DISCOVERED EVIDENCE PROVES EXECUTION BY LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THEREFORE MR. WOODEL'S SENTENCE OF DEATH IS UNCONSTITUTIONAL.

A. Newly discovered evidence of Florida's Lethal Injection Protocol, as amended on July 31, 2007, creates and unnecessary risk of excessive pain and therefore violates the Eighth Amendment's command that "cruel and unusual punishment [not be] inflicted." U.S. Const. amend. VIII. The newly acquired testimonial evidence

and facts demonstrate that Florida's current lethal injection protocol is defective.

B. Florida Statute 945.10 prohibits Mr. Woodel from knowing the identity of the execution team members, denying him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments.

C. The Florida Statute Which Prohibits Mr. Woodel's Counsel from Filing a Section 1983 Claim On His Behalf Deprives Mr. Woodel of Due Process, Equal Protection, and Access to the Courts in Violation of the Florida and Federal Constitution.

Barring a new decision from the Florida Supreme Court or the United States Supreme Court, this Court is bound by precedent from decisions of the Florida Supreme Court holding that execution by lethal injection does not constitute cruel and unusual punishment. See Ventura v. State, 2 So.3d 194 (Fla. 2009), and Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007). Claim VI of the Defendant's Motion is denied.

CLAIM VII
MR. WOODEL'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. WOODEL MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

The defense asserts in its Amended Motion, that the Defendant suffers from mental illness and brain damage, and that the poor conditions under which he is incarcerated could cause him to decline to the point that he is incompetent to be executed. In his Motion, the Defendant acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. In his Motion, the Defendant states; "Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922. 07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986) ..." In Kimbrough v. State, 886 So.2d 965, (Fla. 2004), the Florida Supreme Court stated; " "Under

Florida Rules of Criminal Procedure 3.811 and 3.812, the issue of competency for execution cannot be raised until the Governor has issued a death warrant. *See, e.g., Cole v. State*, 841 So.2d 409, 430 (Fla.2003); *Brown v. Moore*, 800 So.2d 223, 224 (Fla.2001)." The Court finds that the Defendant's claim is not ripe for judicial consideration until a death warrant has been issued. Claim VII of the Defendant's Amended Motion is denied.

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, is **DENIED** with respect to his Claims that he is entitled to a new guilt phase trial. It is further, **ORDERED AND ADJUDGED** that the Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, is **GRANTED** to the extent that he is entitled to a new penalty phase trial based on Ground IIA, Ground IIB, and Ground IIC of his Amended Motion.To Vacate Judgments of Conviction And Sentence.

DONE AND ORDERED in Bartow, Polk County, Florida this 28th day of Dec 2011.

J. MICHAEL HUNTER, Circuit Judge

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